

**NORTH CAROLINA
COURT OF APPEALS
REPORTS**

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²Appointed 9 November 1981.

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⁴Appointed 4 September 1981.

⁵Appointed 1 October 1981 to succeed Hubert E. Olive, Jr. who retired 30 September 1981.

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⁷Appointed 18 September 1981 to succeed Larry Thomas Black who resigned 30 June 1981.

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**S. J. GROVES & SONS AND COMPANY v. STATE OF NORTH CAROLINA AND THE
NORTH CAROLINA BOARD OF TRANSPORTATION**

No. 8010SC60

(Filed 16 December 1980)

**1. Highways and Cartways § 9— highway construction — changed conditions
— notice of claim for additional compensation — sufficiency of letter**

A letter from plaintiff contractor constituted sufficient written notice to defendant Board of Transportation of plaintiff's claim of a "changed condition" at a highway construction site caused by excessive soil wetness and its demand for an equitable adjustment based thereon to comply with § 4.3A of the Standard Specifications for Roads and Structures incorporated into its contract, the plaintiff not being required to spell out in detail the exact nature and extent of the unclassified excavation work it was claiming under a changed condition.

**2. Highways and Cartways § 9— highway construction — claim for additional
compensation — theories before Highway Administrator and trial court**

Plaintiff highway contractor was not permitted to recover at trial on a different theory than that presented to the Highway Administrator where plaintiff recovered at trial on the basis of "changed conditions," and its verified claim letter for increased compensation separated the individual claims into three categories of contract termination costs, certain excavation costs, and costs directly arising from changed conditions, the tenor of the claim was that all categories of increased costs were brought about by unanticipated conditions encountered by plaintiff, and plaintiff's letter encompassed the total claim under the last heading of "changed conditions."

**3. Highways and Cartways § 9— highway construction — changed conditions —
excessive wetness of soil — additional compensation**

The evidence supported the trial court's determination that the parties were mutually mistaken at the time of plaintiff contractor's bid on a highway construction project as to the soil conditions which actually existed, that the presence of these conditions could not have been anticipated from the contract itself, and that plaintiff encountered "changed conditions" at the work site caused by unexpected and excessive soil wetness so as to entitle plaintiff to an equitable adjustment in compensation from that specified in its contract with defendant Board of Transportation.

**4. Highways and Cartways § 9— highway construction — changed conditions
— compensation for additional work — sufficiency of records**

The evidence supported the trial court's determination that plaintiff contractor kept accurate and detailed records with respect to additional work performed on a highway construction project because of excessive soil wetness and gave defendant Board of Transportation the opportunity to supervise and review those records as required by its contract in order to obtain an equitable adjustment in compensation for such additional work on the basis of "changed conditions."

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5. Evidence § 29.2— daily work reports — business records

In an action to recover additional compensation for extra work performed on a highway construction project because of changed conditions, plaintiff's daily work reports and a compilation of total extra costs based on those reports were admissible under the business entries exception to the hearsay rule.

6. Highways and Cartways § 9— highway construction — waiver of completion date — no liquidated damages

Defendant Board of Transportation waived any expectation of adherence by plaintiff contractor to the schedule for completion of a highway construction contract by its refusal to allow plaintiff to waste unsuitable wet soil when initially requested by plaintiff when it knew the wet, unstable soil could not be utilized as indicated in the contract, and defendant was not entitled to assess liquidated damages against plaintiff for plaintiff's failure to complete work under the contract by the completion date set by the contract.

7. Appeal and Error §§ 28.1, 45.1— proposed finding — failure to request finding in trial court — abandonment of exceptions to findings

Defendant's proposed finding of fact is not before the appellate court for consideration where defendant failed to request the trial court to make such a finding and then to except to its failure to do so. Furthermore, defendant's exceptions and assignments of error to findings made by the court are deemed abandoned where defendant failed to cite any authority or the portions of the record upon which it relied to support its argument with reference to such findings. Appellate Rule 28(b)(3).

8. Costs § 4.1— expert witness fee — necessity for subpoena

The trial court had no authority to tax expert witness fees against appellant as a portion of the costs where the court found only that the expert witnesses "were required" to be present during the entire trial but the record contains no subpoenas for these witnesses.

APPEAL by defendant North Carolina Board of Transportation, from *Bailey, Judge*. Judgment entered 14 July 1979 (out of term and out of district by consent of parties), Superior Court, WAKE County. Heard in the Court of Appeals 4 June 1980.

This action was brought under the provisions of G.S. 136-29 for the recovery of additional compensation arising out of a highway construction contract. The following facts are either admitted in the pleadings or appear from uncontroverted evidence.

On 2 May 1972 defendant, the North Carolina Board of Transportation, began advertising for bids for a highway construction project of a length of 5.369 miles, consisting of the relocation of U.S. 64 from the Clay-Macon County line east toward Franklin to a point approximately one and one quarter miles east of Winding Stair Gap. The work was to be done in two segments. The western segment,

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approximately two miles in length was to be completed by 1 October 1973, and liquidated damages were to be in the amount of \$100 per day beyond the completion date. The first segment ran easterly from Station 1026 to Station 1119 and then easterly from Station 0 to Station 30, stations being at 100 feet intervals. The remaining three-mile segment ran easterly from Station 30 through Winding Stair Gap to Station 194. Completion date for this segment was 1 July 1975, and liquidated damages were set at \$300 per day for failure to complete by the date set.

The project called for the construction of only two lanes. Defendant, however, acquired sufficient right-of-way to accommodate four lanes. The plans indicated that there would be an excess of material over and above that required to construct the embankments for the two lanes. With respect to the excess material, the contract required that the contractor place the suitable excess material in embankments which might be used at some later date in the construction of an additional two lanes of U.S. 64. Pertinent contract provisions are set out in the court's findings of fact, *infra*.

Prior to bidding on the project, plaintiff requested and received the subsurface information used by defendant in designing the project. This report contained the following:

No soils are encountered along the project which are unsuitable for reasons of high plasticity, and only a limited amount of organic soils are encountered. By far the dominant soil types are A-4 and A-5 soils; these are approximately equal in importance. Small local areas contained A-7-5 and A-7-6 soils, but all samples indicate low plastic properties and satisfactory material.

Soils should pose no great problems on this project except for perhaps requiring some stabilization in the elastic A-5 soils.

Local areas on this project contain colluvial deposits (concentrations of loose wet boulders and clay silt) that have concentrated from higher elevations. This material is very unstable if disturbed, since it possesses relatively little cohesion and is usually wet. Many sections on this project undercut colluvial material. We anticipate problems with slope stability in these areas and have designed slopes to

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alleviate the problem as much as possible. Some problems will be encountered in this areas (sic), regardless of recommendations.

The contract was awarded plaintiff as low bidder on 23 May 1972, three weeks after the project was advertised for bids, and work was begun on 12 July 1972. The work progressed satisfactorily for a while and then plaintiff began having serious problems with the excessive wetness of the soil and, because proper compactness could not be obtained, had to begin sandwiching with rock to construct the embankments. Defendant refused to allow the unsuitable material to be wasted so that plaintiff could borrow suitable material. Early in June 1973, the first segment was 90% complete, leaving approximately 100,000 to 150,000 cubic yards of unclassified excavation work to be done on this first segment. This work consisted of excavating the material from Black Gap cut and the placement and compaction of it in the future eastbound lane. Plaintiff had used all available rock within the construction limits of this segment in its sandwiching operations. The only cut remaining within the construction limits from which plaintiff could get earth material to complete the embankment fills was Black Gap cut, but this material was too wet for use without rock. Plaintiff called defendant's attention to the problem and asked to be allowed to waste this unsuitable material rather than having to place and compact it in the future lanes. Defendant denied the request contending the material was suitable under the contract. Plaintiff moved equipment to Winding Stair Gap - a large cut full of rock. However, the same excessive wetness was discovered, and plaintiff was forced to put the earth material aside and waste it in order to get to the rock underneath, which it had to blast and haul approximately one and one-half miles back in a westerly direction to complete the sandwiching operation.

On 15 August 1973, plaintiff notified defendant in writing of its claim of a changed condition as follows:

Our contract with you provides all suitable material removed from the excavation shall be used in the formation of embankments.

The special provisions calls the contractor's attention to the fact that the surplus material will be used to construct embankments for the future eastbound lane and any over-usage for the eastbound lane will require contractor to

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supply material at his cost.

Our contract is based upon payment for unclassified excavation only, with the cost of placing an embankment to be included in the unit price bid. The specification provides that the embankment materials shall be compacted to a density equal to at least 95 percent of A.A.S.H.O. T99-57 or standard proctor. Copies of the procedure for taking the tests and determining when the contractor was obtaining 95 percent standard proctor was available upon request.

This procedure states: "If the soil is too wet, it cannot be compacted to the required degree and it will be necessary to let it dry out."

Such statement recognizes the impossibility of compaction if the soil is too wet.

As you are well aware, the contract with you provides a stringent completion schedule, with the contractor being required to construct the project from Station 1029+04 to Station 30+00 by October 1, 1973, including the -Y-lines and driveways, to the extent that payment is placed.

If the project is not completed from Station 1029+04 to Station 30+00 by October 1, 1973, such that two-way traffic could be placed and maintained on the highway, the contractor is to be charged with \$100 per day liquidated damages. The entire project is to be completed by July 1, 1975.

Furthermore, statements were made by the Highway Commission in noncontractual documents prior to bid that, "Soils should pose no great problems on this project, except for perhaps requiring some stabilization in the elastic A-5 soils."

We have, since starting construction in August of 1972, experienced extremely high moisture conditions in the soil due to a number of factors, particularly excessive rain. The soil is unsuitable, particularly when wet, and we have not obtained any drying weather.

Because of the rain, lack of drying conditions, ground water, physical site drainage conditions and particularly the density requirements which are a part of this contract,

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compaction of soil has been throughout performance and is at this time strictly impossible.

Moreover, the Highway Commission has orally refused to recognize the impossibility of any alternative, such as recognizing that the soils on this project are unsuitable for compaction. A particular example of the alternative is the area of Black Gap, where the A-5 soils, according to pre-bid data, exist. These soils should be stabilized or designated unsuitable.

Our contract with you has a changed condition clause. With the schedule demanded and the superior knowledge of the Highway Commission and its design engineers, the contract was based on the fact that the soils could be compacted. We believe that the excessive moisture in the soils of the project created by excessive rain and other reasons, the drainage characteristics and soil conditions constitute a changed condition requiring that the Highway Commission grant us equitable adjustment and extension of time.

We have been advised, based on the history of this project and the facts we know to date, there are several alternate contract doctrines to changed conditions supporting an equitable adjustment and an extension of time.

Pursuant to the specifications and in order to further protect our position in this matter, we hereby notify the Commission in writing that we are now having and have had since the beginning of this project a changed condition of which employees of the Commission have had knowledge.

We have previously orally notified you of the soil compaction problems. Further, we request a meeting to see if the contractor and Commission can reach an agreement concerning an equitable adjustment and time extension for a changed condition and for other reasons.

On 18 September 1973, defendant notified plaintiff that it took the position that no changed condition existed. In that letter defendant advised plaintiff that "If S. J. Groves & Sons Company desires to pursue this matter further it will be necessary that you notify by letter Mr. Ray Spangler, Resident Engineer, of this fact. Prior to writing this

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letter, please review Article 4. 3A and the Supplement of Standard Specification. It will be your responsibility to keep an accurate and detail (sic) cost record of the affected work. These cost records are to be kept with the same care as Force Account Records and Mr. Ray Spangler must be given opportunity to supervise and check all records pertaining to your request."

In response to that letter plaintiff on 25 September wrote to defendant as follows:

September 25, 1973

Sheet 2 of 2

Department of Transportation and Highway Safety
Attention: Mr. W. F. Ray, Division Engineer

S. J. Groves & Sons Company will, as we so advised in the meeting, do our best to keep costs of the changed conditions in accordance with a reasonable interpretation of the contract.

In addition, we will, in prosecuting the work, cooperate with the Highway Commission in performing inspections, surveys, studies, other activities or engineering functions including the taking of cross sections and establishing center lines as requested in the next to last paragraph of your September 18, 1973 letter. However, S. J. Groves & Sons Company will not, in accordance with your request for which there is no contract support, delay, allow interference with, or cease any operation or operations which we deem to be to our benefit to continue.

In November 1973, after completion date, defendant directed plaintiff to waste the remaining material at Black Gap.

Plaintiff filed a verified claim dated 6 October 1975 which was denied by letter of the State Highway Administrator dated 21 April 1976. On 25 June 1976, this action was filed in the Superior Court of Wake County pursuant to the provisions of G.S. 136-29.

After hearing the evidence the court entered findings of fact, and conclusions of law "based on the pleadings, the stipulations of the parties as contained in the pretrial order entered in this matter, the testimony of all witnesses, and all the documentary evidence presen-

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ted by the parties.” Of paramount relevance to this appeal are the following findings of fact and conclusions of law:

(4) That the parties entered into a construction contract on or about June 26, 1972 in the amount of Five Million Three Hundred Eleven Thousand Four Hundred Fifty and 82/100 (\$5,311,450.82) Dollars, based on estimated quantities involving given unit prices, to be paid the plaintiff for the construction of a 5.369 mile section of a highway known as U.S. 64, which construction involved the relocation of U.S. 64 from the Clay-Macon County line in Black Gap northeasterly through Winding Stair Gap to approximately 6,900 feet northeast of Winding Stair Gap. This project was designated as State Project No. 8.3064114, and also Federal-Aid Project APD-16-1 (10). The costs of this project were to be shared equally between the State of North Carolina and the United States Federal Government.

(5) That this project was duly advertised for bids beginning May 2, 1972; and, that the bids were opened and the contract awarded to plaintiff, as the lowest bidder, on May 23, 1972. . . .

. . .

(7) That with respect to the excavation work to be performed, the pertinent parts of the contract documents provided as follows:

(a) “Soils should pose no great problems on this project except perhaps requiring some stabilization in the elastic A-5 soils.” (Sheet 3 of Subsurface Investigation Report.)

The foregoing was a summary of the description of the soils bored and tested by the State as being representative of the natural in place condition of the soils to be encountered in the cuts and to be used in the fills on this project.

While the Subsurface Investigation Report indicated that some cuts would contain “moist” to “damp” to “wet” materials, and while the report further indicated that subsurface ground water would be en-

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countered in the soils contained in the cut material, when the report and other contract documents were and are considered together and in their entirety, there were and are affirmative indications that the ground water could be drained from the cuts in a practical manner and that the materials which were “wet” or “damp” could be dried in a practicable manner and used in the fills in a balanced grading operation and within a reasonable time.

This subsurface report, along with the related plans and specifications, in sum and substance indicated and represented that all soils would be suitable for use in the embankment fills except for approximately 2,100 cubic yards of soils shown underlying two fill areas which would have to be undercut and wasted as being unsuitable.

(b) The contract plans showed that there would be a substantial surplus of excavation material as opposed to fill material required for construction of the two lane highway proposed.

In this connection and in conjunction with the contractual (sic) representations that all excavation materials would be “suitable” for embankment use and would pose no great problems to the contractor, both the location and the quantities of excavation and fill as shown in the contract plans indicated to the contractor that he would be able to conduct a balanced grading operation consisting of minimum hauls by placing the excavation quantities obtained from the closest cuts into the closest adjacent fills.

(c) Article 22-1.2 of the Standard Specifications provided as follows: “Unsuitable material shall be classified as any material which is unsatisfactory for use under a base course or pavement. It shall not include any rock undercut in the roadbed.” A special provision for this project, however, deleted this Standard Provision with respect to “unsuitable materials,” and indicated, in effect, that all soils materials on the

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project would be suitable and could and would be used for embankment fill, and that the expected surplus material excavated from cuts and not needed in fills would be placed in an eastbound future lane where such surplus material would be sloped and compacted the same as the fill material used in the two lane proposed to be constructed by the project. (Page 4 of the Project Special Provisions).

(d) Article 25-3.3 of the Standard Specifications as amended by Section 20 of the amended Standard Specifications (p. 32), and as further supplemented by the Standard Special Provisions, provided in pertinent parts as follows: "The embankment material shall be thoroughly compacted. . . shall be rolled for its full width and thoroughly compacted to a density equal to at least 95% of that obtained by compacting a sample of the material with the equipment and in the manner prescribed by AASHTO T99-57. The moisture content of the sample material will be at the optimum estimated by the Engineer for proper compaction.

In short, the compaction requirements for the embankment material on this project were stringent, and the related contract documents indicated that the embankment materials would be "suitable" and could be compacted in a practicable manner according to AASHTO T99-57.

(e) Section 22 of the Standard Specifications provided that: "All suitable material removed from the excavation shall be used *as far as practicable* in the formation of embankments, subgrade, shoulders, and at such other places as directed."

(f) Standard Special Provision entitled "Proof Rolling" set forth that the finished subgrade shall be tested and rolled by "heavy pneumatic tired compaction equipment for compacting the roadbed and testing the roadbed for stability and uniformity of compaction." The section further provided in detail the type and weight of the proof rolling equipment

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required and the manner in which the proof rolling was to be done. In particular, it further provided as follows: "If it becomes necessary to take corrective actions, such as, but not limited to, underdrain installation, undercut and backfill of unsuitable material and aeration of excessively wet material in areas that have been proof rolled, these areas shall be proof rolled again following the completion of the necessary corrections. If the corrections are necessary due to the negligence of the Contractor or weather, the corrective work and additional proof rolling shall be performed by the Contractor at no cost to the Commission."

(g) The time requirements of the contract provided that the project would be available for the beginning of construction from July 3, 1972; and, that the western approximately two (2) mile portion of the project (from Station 1029+04 to Station 30+00) must be completed by an intermediate completion date of October 1, 1973. All work, on the entire 5.369 miles of roadway, was to be completed by July 1, 1975.

Thus, while the project contained stringent intermediate and final completion dates, implicit in those time prescriptions was an affirmative indication or representation that this work *could be accomplished within the times prescribed*.

(h) Paragraph (E) of the Standard Special Provisions relating to the "Protection of the Environment" provided as follows: "The Contractor shall perform excavation, borrow, and embankment operations in such a manner that cut and fill slopes will be completed to final slopes and grade in a continuous operation. The operation of removing excavation material from any cut and the placement of embankment in any fill shall be a continuous operation to completion unless otherwise permitted by the Engineer. The excavation, borrow, and embankment operations will not be allowed to accumulate exposed, erodible areas in excess of seventeen (17) acres at any

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one given time without the Contractor's beginning permanent seeding and mulching and other erosion control measures."

(i) Paragraph 4.3A of the Standard Specifications as amended (p.4) provided in pertinent part as follows: "Should the Contractor encounter or the Commission discover during the progress of the work *conditions at the site differing materially from those indicated in the contract*, which conditions could not have been discovered by reasonable examination of the site, the Engineer shall be promptly notified in writing of such conditions before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause a material increase or decrease in the cost of performance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly.

In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged changed conditions, the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quantity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work."

(8) That the pertinent contractual (sic) provisions set forth hereinabove, as they pertained to the unclassified excavation work, constituted both requirements of and representations and positive indications to the plaintiff that the in place nature and properties of the soil materials to be excavated from the cuts and to be placed and compacted in the fills were such as to allow practicable use of these soils in

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the fills, and that these excavated soils could be dried and compacted according to contract specifications and within the given contract time limits.

In other words, inherent in each such requirement was also a representation or indication to the plaintiff that such requirement could be met with reasonable and practicable effort on the plaintiff's part. For example, the compacting, proof rolling, and construction time requirements were very stringent.

Accordingly, implicit in those same stringent requirements was an accompanying indication or representation to the plaintiff that these requirements could be met with reasonable effort and within a reasonable time in order to meet the contractual (sic) requirements.

(9) That the defendants furnished the plaintiff all of the contract documents after May 2, 1972 in order that the plaintiff could examine and analyze the same and formulate its bid based thereon before the bid opening date of May 23, 1972. These documents were not made available to any prospective bidders prior to the advertising date of May 2, 1972, so the plaintiff, as well as other bidders was allowed only three (3) weeks in which to examine and analyze the contractual (sic) documents, make a reasonable examination of the site, and submit its bid. The plaintiff's personnel, including its estimator for this project with approximately twenty-five (25) years in construction experience, examined the site of construction on May 15, and 16, 1972, approximately five (5) days after receiving the bid documents. At this time, the project for the most part was heavily wooded with trees and other natural ground vegetation.

They drove around the perimeter of the project, and then walked the centerline of the project from Black Gap on the western end and easterly toward Winding Stair Gap as far as the centerline stakes existed to the beginning of Winding Stair Gap. The weather was clear during this period of time and the ground was not wet or noticeably soft.

There was a logging operation being conducted at a point

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approximately one-half way through the project, and the logging trucks and other support equipment were having no problem with a wet or unstable ground surface.

As a part of the site examination, the plaintiff also confirmed the local prices for materials to be incorporated into its work such as concrete and aggregate. In short, the site examination and investigation indicated nothing to the contrary with respect to the subsurface soil conditions from that already indicated in the contract documents.

There was not sufficient time nor was it economically practicable or feasible within the advertising and bidding time for the plaintiff to conduct its own subsurface drilling and exploration program to confirm or contradict that which was already indicated in the contract documents with respect to the natural in place condition of the subsurface soils to be encountered. In short, the plaintiff's personnel conducted a reasonable examination of the site prior to bid, and there existed no reasonable observable physical facts within the project boundaries which would have indicated to the plaintiff that any geological problems existed which would cause the plaintiff any great problems with respect to excessive moisture content contained in the subsurface soils or which would prevent the plaintiff from performing its work in a balanced grading operation using suitable fill materials and being able to compact the soils according to contract indications and requirements and within the contract time limitations.

(10) That the plaintiff commenced his work pursuant to all of the foregoing terms of the contract in a timely manner in mid-July, 1972. At the preconstruction conference held immediately prior to work beginning, he advised the defendants that he intended to conduct a second shift each work day (a night shift) whenever feasible and practicable.

The defendants had not been prepared for this type of operation involving this rate of progress, and they had to hire additional inspectors to work with this night shift.

Nevertheless, the defendants' welcomed this obvious display of intent on the plaintiff's part to complete its contrac-

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tural (sic) obligations not just within the allowable contract time but even possibly sooner than required by the defendants. In addition, the plaintiff commenced work with an impressive spread of earth moving equipment consisting of scrapers, dozers, end-dump machines, loaders, backhoes, and drilling and rock blasting machinery.

(11) That almost from the beginning of construction, however, excessively wet and unstable materials were encountered in the cuts which were unsuitable for use in the adjacent fills. With the amount of rainfall that was occurring in that area, it was both economically impracticable and a physical impossibility to dry this excavation material sufficiently so that it could be stabilized, sloped and compacted in the fills according to contract requirements and within the contract time. Faced with this practical impossibility, the plaintiff had to abandon his original grading operation plan whereby it had intended to excavate the closest cuts and place this material in the nearest fills in a conventional and balanced grading plan.

Rather, the plaintiff had to initiate a "select borrow" operation within the construction limits whereby it would have to go to the closest available rock cuts, remove the overburden, drill and blast the rock, haul the rock and use this rock to commence the fills, and then alternate thereafter in each fill a layer of earth and then a layer of rock until subgrade was reached.

Accordingly, rather than having a balanced and sequential earth moving operation whereby the closest excavation could be placed in the nearest fill, the plaintiff was forced into an unbalanced select operation of having to construct his fills by placing the closest rock between alternate layers of excessively wet, unstable and thus unsuitable earth materials.

(12) That shortly after the beginning of construction and at least by May 1, 1973, both the defendants and the plaintiff discovered that the earth material excavated from the cuts was unexpectedly excessively wet and unstable and could not be sloped and compacted according to contract specifications within the contract time. The defendants, as well

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as the plaintiff, then realized that the subsurface conditions existing at the time of bids and to be encountered on the project were not as had been represented or indicated by the contract documents prior to bid and were not compatible with the manner in which the project had been planned and designed.

(13) That according to the testimony of the defendants' own Resident Engineer, who was responsible for the administration of the contract and who supervised the inspections of the plaintiff's work for the most part of the project, the following considerable problems with soil conditions were encountered by the plaintiff almost from the beginning of construction and thereby dictated the accompanying changes in the Contractor's method and manner of performance of the general excavation work required under the contract;

(a) The major item of work required under the contract was the unclassified excavation which the contract documents indicated to be in the approximate amount of 4,267,000 cubic yards at the plaintiff's bid price of \$.79 per cubic yard, or a total price for doing the excavation of Three Million Three Hundred Seventy Thousand Nine Hundred Thirty and No/100 (\$3,370,930.00) Dollars.

(b) That the contract documents, and in particular the plans, indicated that all of the soil materials excavated from the cuts could be used in the fills and compacted according to contract specifications and requirements; that the plans indicated that there would be a surplus of 924,718 cubic yards of soil materials excavated from the cuts and not needed in the fills of the highway being built but which would be suitable and would have to be placed and compacted according to contract requirements in a future eastbound lane; that the contract documents and, in particular, the plans indicated that only 2,150 cubic yards of undercut or unsuitable material might be encountered and need to be wasted, this undercut being indicated to exist in two certain fill areas; that

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“unsuitable” material, or material that would have to be wasted rather than used in embankments and compacted, would be and was material that in effect could not be dried and compacted within a reasonable time and in a practicable manner; and, that except for the 2,150 cubic yards of undercut shown in the plans to possibly require wasting, the plans indicated all other excavation material would and could be placed in the embankment fills and compacted.

(c) That as Resident Engineer, he never had any reservations about the amount of equipment that plaintiff initially brought to the site to perform the contract; that the plaintiff's equipment was in good shape; that for the life of the project the plaintiff cooperated with him in attempting to coordinate the work so that the contract work could be completed as soon as possible; that he was completely satisfied with the plaintiff's efforts in the execution and completion of the work; that the plaintiff always had sufficient personnel and equipment who would work when the soil and weather conditions would permit; that the soil materials in general throughout the project when excavated from the cuts were quite often wet and very slow to dry; that as a result of the wet material coming from the cuts and the plaintiff's inability to dry the same within the contract time limits, the plaintiff had to resort to constructing the fills with the alternate use of layers of rock with layers of soil materials, which was a “sandwich method” of operation; that the plaintiff had to resort to this sandwiching operation from early in the project; that while the plaintiff did not complete its work in the first phase of the project until approximately one year beyond the contract intermediate completion date of October 1, 1973, the plaintiff could not have even completed this work by that time without using this “sandwiching” method of operation; and, that the effects of this sandwiching method of operation required the plaintiff quite often to haul outside the balance points throughout the project rather than

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within the balance points as indicated in the plans because the location of rock to be used in the sandwicing of fills controlled the hauls of excavated materials for the construction of fills rather than the location of soil materials between the balance points.

(d) That in general the plaintiff's progress from the beginning of construction in July, 1972 up through May, 1973 was good; that beginning in May, 1973, however, the cut material located in Black Gap in the approximate quantity of 100,000 cubic yards were extremely wet and unsuitable for use in embankment fills in their natural undisturbed state and could not be used in the remaining fills to be constructed in the first phase; that the excavation and disposal or attempted use of these materials from the Black Gap cut controlled the completion of the first phase from May, 1973 until the final completion of this phase; that the plaintiff's unclassified excavation work as of June, 1973 was 90% complete in the first phase of the project; and, that if plaintiff had been allowed to waste the unsuitable materials contained in the Black Gap cut beginning in June, 1973, then he could have completed the first phase of the project on time by the contract intermediate date of completion of October 1, 1973; that beginning in early June, 1973, the plaintiff began requesting of the defendants that it be allowed to waste the Black Gap cut materials as being "unsuitable" and replace these materials necessary for the completion of the remaining fills with "borrow" soil materials and rocks from outside of the slope stakes of the project construction limits; that there was little or no rock remaining in the cuts left in the first phase by this time, so the plaintiff could not continue its sandwicing operations without these borrow materials; that in June, 1973, the plaintiff advised the defendants that it was quite obvious that not only would all the remaining cut material in Black Gap require wasting as unsuitable but that it was also obvious that when this unsuitable material was excavated to planned grade that substantial amount

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of undercutting of the material in this cut below planned grade would be necessary if this phase of the project was ever going to be completed; that notwithstanding these continuing requests and advices from plaintiff to defendants concerning how the job was going to have to be completed, the defendants refused to allow the plaintiff to waste and undercut these materials in Black Gap until the beginning of November, 1973; that as a further result of the defendants preventing the plaintiff from wasting this unsuitable material contained in the Black Gap cut from May, 1973 until November, 1973, it was impossible for the plaintiff to achieve any significant progress in the completion of its unclassified excavation work in the first phase; that as a further result of the foregoing and although only 10% of the unclassified excavation work remained to be done in the first phase as of June, 1973, the plaintiff could not complete this remaining 10% of this work until July, 1974; and, that the other items of work under the contract such as laying of the base course for pavement, the laying of pavement, the construction of guard-rails, etc., were dependent and sequential in nature, namely, this work in general could not be begun and accomplished until all the unclassified excavation work had been completed.

(e) That as a result of being unable to continue its work in the first phase of the project beginning in June, 1973, the plaintiff had to shift its equipment and personnel and begin concentrating its work on the eastern end of the project at Winding Stair Gap where considerable sources of rock existed; that there were considerable quantities of earth materials in the cuts leading up to Winding Stair Gap with which the plaintiff could have excavated and completed the fills west from Winding Stair Gap but for the fact that this material, quite similar to the cut material in Black Gap, was excessively wet in its undisturbed natural state and unsuitable for use in the embankment fills; that as a result of the foregoing, the plaintiff was

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required to concentrate his excavation operations to the blasting and hauling of rock from the cut on top of Winding Stair Gap, then hauling this rock back westwardly for the construction of the fills by the "sandwich method" from Winding Stair Gap back towards the end of the first phase of the project at Station 30.

(f) That in the middle of July, 1973, the plaintiff met with the defendants and told the defendants that in order to construct any further fills in the first phase that the plaintiff was going to have to borrow rock from outside the construction limits; that the Resident Engineer admitted to plaintiff at this time that this was the only practicable way to continue any work in this phase but denied that the defendants would pay for this rock borrow; that the plaintiff then informed the defendants that it was going to borrow this rock and present a claim for the payment of the same since the contract had no provisions or established price for the use of borrow and had, in fact, indicated no borrow would ever be necessary for construction of fills; that as a result of the plaintiff's notice to defendants of its need and intent to use this borrow and claim extra compensation for the cost of performing this operation, the Resident Engineer then cross-sectioned the borrow area prior to the removal of this rock borrow in order that it could be ascertained at a later date how much rock had been borrowed from this area; that from the end of July, 1973, until the completion of the first phase, the plaintiff borrowed rock from outside the construction limits from Station 1072 to 1078 and used the same for the backfill of undercut required but not shown on the contract plans in Black Gap and for the related construction of fills immediately adjacent to this undercut area. That when the defendants finally directed the plaintiff to waste the remaining cut material in Black Gap and subsequently undercut the same, this same borrow rock was directed to be used to replace this undercut material at an agreed upon unit price.

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(g) That on or about August 15, 1973 the plaintiff notified the Resident Engineer that it was claiming a changed condition that was then affecting and had been affecting its excavation work since the beginning of the project; that on October 2, 1973 the Resident Engineer met in plaintiff's field office to review with plaintiff how the plaintiff's cost records were being kept as pertained to the claimed changed condition; that the plaintiff then showed the defendants its daily records and how it had been keeping strict account of its operating labor and equipment performing excavation work; and, that in addition the plaintiff then explained to the defendants that it was having its foremen assign a special code number in the 700 series to all extra work or effort that they judged to be caused as a result of the changed condition affecting the unclassified excavation work in general; that the plaintiff then in addition offered to allow the defendants to examine its records daily; that the Resident Engineer conceded that plaintiff kept good daily cost records on this project both before and after the notice of the claim for changed condition; that these daily cost records that plaintiff kept were fully detailed as to what equipment was working, what type of work it was doing, and how long on an hourly basis it was doing this work; that the Resident Engineer never told the plaintiff that any other method of record keeping would be required or that plaintiff's method was unacceptable; that the plaintiff at the October 2, 1973 meeting further afforded to supply the defendants computer print-outs of its general excavation costs on a weekly basis which were based on the daily time and equipment records kept by the job foremen; but, that the defendants after the aforesaid meeting and during the remainder of the work on the project, neither requested these cost print-outs from plaintiff nor did the defendants thereafter review the daily reports of the foremen; and, that the defendants then did not agree that cost records should be kept on all the unclassified excavation work on a force account basis.

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(14) In addition to the foregoing testimony of the defendants' Resident Engineer, which this Court finds to be pertinent facts in this case, the documentary evidence and testimony of the other witnesses for both parties, both confirmed and supplemented the testimony of the Resident Engineers.

(15) From early in the project, the plaintiff was required to resort to the "sandwiching" method of constructing all embankment fills. The plaintiff proceeded with this unconventional and unbalanced method and manner of constructing the embankment fills in a good faith intent to complete the project at his bid price notwithstanding those adverse and unexpected subsurface conditions which were aggravated by the substantial monthly rainfall which occurred on the project. The plaintiff's originally expected progress and costs were considerably affected by these unexpected subsurface conditions requiring this unconventional method and manner of construction, but his operations were not initially paralyzed. To combat these unexpected adverse conditions, the plaintiff added to his original spread and complement of grading equipment two large draglines with accompanying mats, and two tandum powered, twin-engined, double-barreled scrapers. These draglines were required because the soil materials to be excavated from the cuts were quite often too unstable and wet to be excavated by more conventional earth moving equipment. In addition, once excavated, because of the wet grades the more conventional earth moving equipment would quite often become stuck. Accordingly, these two tandum powered scrapers were used to haul earth on the wet grades which the more conventional scrapers could not.

(16) By June, 1973, and notwithstanding the differing site conditions which the plaintiff had encountered and been combating since almost the beginning of construction, the plaintiff's overall actual progress was ahead of the original progress schedule and his excavation work in the western two mile portion of the project with an intermediate completion date of October 1, 1973 was approximately 90% complete. At this time, however, it became abundantly

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clear to both the plaintiff and the defendants that the plaintiff had exhausted all available rock excavation with which to construct the remaining fills in the western portion of the project. In addition, the only significant source of earth material available to complete his fills was the cut material remaining in place in Black Gap in the approximate amount of 100,000 cubic yards. Yet excavation on this cut had already begun and it was obvious to all parties that this material, even with the sandwiching of rock, was unsuitable for use in the remaining fills. This material, in its natural and undisturbed state and without rain, was nothing more nor less than *mud* for all practical purposes. Accordingly, the plaintiff advised the defendants that any further progress in this portion of the project would be virtually paralyzed *unless* the plaintiff were allowed to *waste* the unsuitable Black Gap material and *borrow* other earth material and rock from outside the planned construction limits with which to construct the remaining fills and backfill undercut in this area which would be necessary although not shown on the plans. The defendants initially said "no," and insisted that this portion of the project had to, in effect, be completed with the remaining materials available within the construction limits, and that this Black Gap material was "suitable" for construction because the construction documents indicated them to be suitable. As a result of this unwise position taken by the defendants, the plaintiff's work could not proceed. Finally, in the middle of July, 1973, the plaintiff advised the defendants that it *had to borrow* earth and rock material for the completion of the fills and undercut in the first phase. The defendants then impliedly agreed that this had to be done notwithstanding contract indications to the contrary, but the defendants still insisted that it would have to be done at the plaintiff's expense with no additional compensation to be forthcoming from the defendants. The plaintiff protested and informed the defendants that it would file a claim for payment as borrow. Accordingly, the defendants made the necessary cross-section computations to determine the quantity of borrow material which might be involved in the claim. Shortly thereafter, the plaintiff formally notified the defendants in writing of its claim for

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having encountered a differing site condition from the beginning of the project.

(17) That because the plaintiff had initially reached this impasse with the defendants in June, 1973 with respect to the work remaining in the western portion of the project, the only other place available for working its equipment was on the eastern portion of the project where a large cut full of rock existed at Winding Stair Gap. Accordingly and at the insistence of the plaintiff, the defendants finally de facto waived the contractual (sic) requirements with respect to erosion control and allowed the plaintiff to concentrate his work and equipment where the necessary rock could be uncovered and some progress could be achieved. The contract documents had indicated that the earth material on the western side of the cut at Winding Stair Gap would be suitable for use in the fills west of this cut. If this had been the case as had been anticipated by the plaintiff, then the excavation and hauling of these materials to the fills could have proceeded in a westerly direction on a downhill grade. But this earth material in the western side of Winding Stair Gap cut were also discovered to be excessively wet and unsuitable, so the plaintiff for the most part had to leave these materials in place, construct a haul road over them out of rock taken from the eastern side of Winding Stair Gap, and proceed to haul rock on a "cross-haul" basis from the eastern side of Winding Stair Gap to the fills west of Winding Stair Gap. Accordingly, rather than hauling suitable fill material over a suitable downhill grade from the western side of this cut to the westerly fills, the plaintiff was forced to excavate and haul rock from the eastern side of this cut, along an uphill grade consisting of excessively wet and unsuitable materials, and then down through an even more excessively wet and unsuitable grade. Because the grade materials were so unsuitable and unstable, the plaintiff was constantly forced to expend considerable time and effort in just maintaining the haul roads over the grades so that it could achieve at least minimum progress, albeit, unexpectedly expensive.

(18) That finally in late October, 1973, the defendants realized that it had to accept what the plaintiff had been

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telling it since June, 1973, namely, that if the western two mile portion of the first phase of the project was ever to be completed, then the unsuitable cut materials remaining in Black Gap would have to be wasted on a complete and massive basis and the underlying foundation material undercut. The defendants were five (5) months late in accepting this reality, however, and had already prevented the plaintiff from utilizing the best five weather months that ever occurred during the life of the construction project in which to accomplish this slow and expensive work involved in the wasting, undercutting, and backfilling earth material from Black Gap. Accordingly, and as a result of the defendants' own failures to accept these realities until it was too late, the plaintiff's operations were forced into the winter and summer of 1974 in order to complete the excavation and undercutting of this unsuitable waste material in Black Gap and the completion of the adjacent fills which was dependent on the foregoing operations. And, since the base stone course and subgrade could not be placed and finished paving begun until this excavation undercut and embankment work was completed, the plaintiff could not complete the western two mile portion of the project until September 29, 1974 as opposed to the contractual (sic) prescribed intermediate completion date of October 1, 1973.

(19) That as if these unexpected and unanticipated problems the plaintiff had encountered with respect to the grading operations in Black Gap and Winding Stair Gap during the summer and fall of 1973 had not been enough, a minor slide of a fill under construction east of Winding Stair Gap occurred on October 4, 1973. While this slide was "minor" in degree, it was extremely major and critical in nature. This slide confirmed what the plaintiff had been telling the defendants from almost the inception of construction, namely, that the designers of this project obviously had not anticipated nor taken into consideration the excessively wet subsurface conditions and the unstable soils required to be used in the fills.

That prior to this slide having occurred east of Winding Stair Gap various other slides had occurred on various cut

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slopes throughout the project since early in construction. These slides were as a direct result of the excessively wet and unstable materials as contained in the cut areas in their natural and undisturbed state being incompatible with the slope designs shown in the plans. When this particular slide occurred in this fill section east of Winding Stair Gap, however, it was obvious to the plaintiff and defendants that this design deficiency could not be corrected on a permanent basis merely by clearing up the slide area and beginning the fill again. Accordingly, the defendants suspended plaintiff's operations in this area, and the plaintiff retained three (3) experts in soils mechanics engineering, and undertook an extensive exploratory drilling program to determine if the larger fills in this area were going to be subject to further slides in the future if the plaintiff continued to build these large fills as designed.

That as a result of the exploratory work and the in-depth analysis made by the plaintiff's expert consultants, the results and conclusions of which were afforded the defendants, the defendants accepted the plaintiff's advice and undertook a substantial redesign of the remaining portion of the project east of Winding Stair Gap. When the defendants submitted this redesign to the plaintiff for his cost analysis and bid price, the plaintiff quoted a price of approximately \$5.5 million just to finish this eastern portion of the project as redesigned. Of course, prior to the suspension of its work in this area and the redesign, this same eastern portion of this project had been included in the plaintiff's overall bid of approximately \$5.3 million. At the time plaintiff quoted this price for the redesigned work, the plaintiff had its same expert consultants review the redesign, and they all agreed that even the redesign would fail. The defendants' own experts subsequently agreed with the plaintiff's experts' reasoning again, and this remaining portion of the contract was then cancelled.

That the portion of the contract that was cancelled was subsequently relet after design changes were made and the contractor who was awarded the work bid \$1.70 per cubic yard for unclassified excavation, his price being in excess of

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twice the amount plaintiff bid on the original project in that the soil conditions were then known.

(20) That ultimately, the plaintiff was only required to finish and pave that western two mile portion of the project from Station 1029+04 easterly to Station 30+00. From Station 30+00 easterly to Station 114+00 on the western side of Winding Stair Gap, the plaintiff was only required to bring the embankments to rough subgrade, and this area was seeded and grassed.

(21) That this highway project was a 50% federally funded project. Accordingly, when the final cost of this plaintiff's work was known, the defendants had to transmit a justification to the federal government of any and all cost underruns or overruns. The following are significant items of underruns and overruns and the accompanying reasons stated by the defendants' Project Resident Engineer for the cause of the same.

Each overrun and underrun was directly or indirectly related to and a significant indication of the unexpected subsurface conditions encountered involving extremely wet and unstable soils and unexpected drainage problems. These overruns and underruns became strikingly significant when it is taken into consideration that they occurred when less than one-half of the project was finally completed and only approximately 2/3 of the project was rough graded while the underruns and overruns as indicated are based on quantities originally planned for the entire project:

(a) *Unclassified Excavation*: Original amount: 4,267,000 cubic yards; Final amount: 2,670,742 cubic yards; Quantity underrun: 1,596,258 cubic yards. *Reason*: "The discovery of unstable embankment conditions between Station 114+00 to Station 194+00 resulted in the suspension of work in this area and the subsequent partial deletion of unclassified excavation."

(b) *Drainage Ditch Excavation*: Original amount: 15,000 cubic yards; Final amount: 31,008 cubic yards; Quantity overrun: 16,008 cubic yards. *Reason*: "A

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large number of silt basins were excavated and re-excavated several times during the life of the project causing the overrun."

(c) *Undercut Excavation*: Original amount: 2,150 cubic yards; Final amount: 26,176 cubic yards; Quantity overrun: 24,026 cubic yards. *Reason*: "During construction a much greater amount of unsuitable material was encountered and had to be removed than was originally anticipated."

(d) *Coarse Aggregate Base Course, Stabilization of Sub-Grade*: Original amount: 5,450 tons; Final amount: 10,526.75 tons; Quantity overrun: 5,076.76 tons. *Reason*: "The roadbed was stabilized from Sta. 1026+00 to Sta. 30. Original calculations called for 40% of the area to be stabilized. Also, the rate of stabilization was increased in certain fill areas."

(e) *Proof Rolling*: Original amount: 38 hours; Final amount: 7.9 hours; Quantity underrun: 30.10 hours. *Reason*: "The discovery of unstable embankment conditions between Sta. 114+00 to Sta. 194 resulted in the suspension of work in this area. . . Also, proof rolling was deleted on portions of the project between Sta. 1026 to Sta. 30."

(f) *Underdrain Excavation*: Original amount: 3,800 cubic yards; Final amount: 4,590 cubic yards; Quantity overrun: 790 cubic yards. *Reason*: "During construction extremely wet subsurface conditions were encountered which required the extensive use of underdrain."

(g) *Underdrain Fine Aggregate*: Original amount: 1,900 cubic yards; Final amount: 1,589 cubic yards; Quantity underrun: 311 cubic yards. *Reason*: "During construction extremely wet subsurface conditions were encountered which required the extensive use of underdrain."

(h) *Perforated Pipe, Underdrain*: Original amount: 6,800 l.f.; Final amount: 15,085.7 l.f.; Quantity overrun: 8,285.7 l.f. *Reason*: "During construction extreme-

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ly wet subsurface conditions were encountered which required the extensive use of underdrain."

(i) *6" Pipe Wyes, Underdrain*: Original amount: 63 ea.; Final amount: 2 ea.; Quantity underrun: 66 ea. *Reason*: "Because of the type of drainage problems encountered not so many were needed as was originally calculated."

(j) *Concrete Spring Boxes*: Original amount: 6 cubic yards; Final amount: 2.93 cubic yards; Quantity underrun: 3.07 cubic yards. *Reason*: "Because of the nature of the drainage situations encountered, spring boxes could not be utilized at all locations called for on the plans."

(22) That this transmittal of explanation of underruns and overruns by the defendant to the federal government was not forwarded nor made available to plaintiff by the defendants prior to this lawsuit.

That in reviewing the overruns and underruns set forth above, along with the defendants' Resident Engineer's descriptions of the causes, it becomes convincingly clear that the wet subsurface conditions were certainly not anticipated by the defendants prior to the award of the contract. This was the case notwithstanding the fact that the defendants supposedly expended some two (2) years prior to the award of the contract conducting an in-depth subsurface exploration and investigation to determine the condition of the subsurface soils so as to inform themselves and prospective bidders of the likely subsurface conditions to be encountered. As confirmed by the design of the project and the defendants' own engineer's estimate for performing the work, however, the defendants anticipated no great problems with respect to the stability of the subsurface soils to be encountered.

(23) That the most revealing unanticipated overrun in quantities is that of the undercut of unsuitable materials which had originally been estimated by the State prior to bids to involve only 2,150 cubic yards. The final quantities of unsuitable materials which were undercut and wasted

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was 26,174 cubic yards or a 1200% overrun as shown and even these figures are vastly misleading, however. In point of fact, this overrun occurred when only approximately 2/3 of the project as originally planned was rough graded. Furthermore, the greater portion of this overrun occurred in the cut section of Black Gap where the defendants' plans and subsurface investigations indicated no undercut whatsoever. In this same cut, the plaintiff was also required to waste as unsuitable most all of the material above that which was undercut because it had the same properties and nature of that which had to be undercut below the planned grade. This material amounted to approximately 100,000 cubic yards. Accordingly, when added to the overrun figure labeled as "undercut" in the Resident Engineer's final estimate, the true "undercut" quantity for the project would be approximately 126,000 cubic yards, or an overrun of 5860% in terms of known unsuitable material which had to be wasted. Furthermore, based on the defendants' Resident Engineer's own records there were various other quantities of unsuitable material which had to be wasted from different cuts throughout the project.

(24) That the second most revealing overrun shown above was that of the Coarse Aggregate Base Course used for the stabilization of the subgrade. As shown, the defendants originally anticipated only having to use this stabilization for approximately 40% of the 5.4 mile project, and even then with the use of only 5,450 tons. In point of fact, however, the only stabilization used was in the first phase of the project, or first approximate two (2) miles, and in order to stabilize this subgrade, 10,526 tons was required for the entire roadbed. Stabilization of the rough subgrade from the end of the first phase at Station 30 easterly to the western side of Winding Stair Gap was not attempted as this section was left at rough subgrade.

The subsurface Report made available to the plaintiff prior to the bid stated: "Soils should pose no great problems on this project except perhaps requiring some stabilization in the elastic A-5 soils." As testified to by the defendants' Resident Engineer, this "stabilization" referred to in the foregoing statement meant the use of the Coarse Aggregate

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Base Course referred to above. Contrary to what was indicated in the Subsurface Report, however, the "some stabilization" referred to therein was a gross understatement in that for the only segment completed, the entire roadbed had to be stabilized and at a rate and use of stabilization stone twice that shown in the plans to be necessary for the entire project.

Again, the foregoing is directly indicative of the unanticipated inability of the plaintiff to be able to compact the soils according to the original contract requirements and indications. Because these soils were unexpectedly excessively wet in their undisturbed state in the cut areas, and they could not ever be dried sufficiently for proper compaction, the "sandwich method" of construction had to be used and massive course base aggregate stabilization substituted for the compaction efforts which proved to be futile.

As further evidence of the foregoing, the defendants ultimately waived all compaction requirements of the contract, ceased running density compaction tests as would have otherwise been required, and ultimately directed the plaintiff to delete proof rolling of the finished subgrade. In this regard, the plaintiff was directed to proof-roll and thus test the compacted stability of the first finished subgrade in the middle of October, 1973. All these tests failed, and according to the terms of the contract, the areas that failed were to be re-shaped and compacted according to contract specifications and re-tested by repeated proof rolling at plaintiff's expense. The defendants, however, being fully aware that compaction was and had been impossible as proven by these proof rolling failures, then deleted any further proof rolling requirements.

(25) That subsequent to the defendants' stop work order in early October, 1973, concerning any work east of Winding Stair Gap, it became apparent that the defendants' design was deficient and inadequate due to the unforeseeable and unexpected conditions the plaintiff had encountered some five to six months earlier, i.e., extremely high moisture content in the in place subsurface soils. It was determined that not only were these soils unsuitable for embankment

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but were unstable in their natural state and proposed fills could not support additional material from cut areas. As a result of these differing site conditions and deficient design the remaining portion of the contract was cancelled. That upon cancellation of the remaining portion of the project, the defendants under the terms of the contract were required to reimburse the plaintiff for certain costs inherent in the underrun of the unclassified excavation quantities resulting from the cancellation of the project. These costs were strictly related to the cancellation and accompanying underrun of unclassified excavation and in no way related to the extra costs the plaintiff had incurred as a result of the differing site condition prior to the cancellation.

With respect to the underrun in quantities resulting from the cancellation, the defendants paid to plaintiff One Hundred Seventy-six Thousand Two Hundred Sixty-eight and 97/100 (\$176,268.97) Dollars. In addition and as a further result of this cancellation and underrun, the defendants paid the plaintiff the sum of One Hundred Ninety Thousand Five Hundred Ninety-three and 21/100 (\$190,593.21) Dollars for unabsorbed overhead costs which the plaintiff could not recover by being unable to complete the quantities as planned. Finally, the defendants also reimbursed the plaintiff for its exploratory drilling costs in the amount of Thirteen Thousand Two Hundred Fifty-six and 72/100 (\$13,256.72) Dollars which had established the defendants' defective design of the project. What the defendants paid to the plaintiff related strictly to the cancellation and underrun of quantities, however, what the defendants failed to pay was the plaintiff's unabsorbed expenses of unexpectedly having to demobilize its equipment and transporting it back to its home office shop in Charleston, West Virginia rather than being able to send it to another project as theretofore planned. These unabsorbed extra costs not paid by the defendants but caused by the unexpected cancellation of the work caused by the differing site conditions, amounted to Thirty-one Thousand Twenty-six and No/100 (\$31,026.00) Dollars.

(26) That based on the testimony of two expert witnesses

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presented by the plaintiff, namely, Dr. C. Page Fisher, Jr., a consulting engineer and renowned specialist in soils mechanics and foundations, and Francis L. Holloway, an engineer and specialist in soils mechanics and renowned cost analyst dealing with the impact of soils problems, both of whom investigated the site while the project was being built in the fall and winter of 1973 and 1974, this Court makes these additional findings of fact:

(a) That soil borings had been made in cut areas during the middle of September, 1973 to determine the in place moisture content of the cut materials in their natural and undisturbed state; that these borings were made by Pittsburgh Testing Laboratories at the request of another expert soils mechanics consultant retained by the plaintiff to assist in resolving the soil problems; that this consultant investigated the site also, but has since died; that those borings obtained at his direction and their then existing natural in place moisture content were representative of the condition of most of the materials which were excavated from the cut areas and used in embankment fills or wasted during the life of the project; that these borings, along with the two experts' analysis of the same in conjunction with their personal examination of these materials being excavated and used in the fills which they observed while in the project during construction, substantiated that most of the soil materials excavated from the cuts and used in the fills or wasted during the construction of this project were unsuitable for use in fills in a practicable manner by conventional compaction techniques; that these materials were unsuitable for such use because they had an excessive natural moisture content while in their undisturbed natural state in the cut areas; that this same subsurface condition of these soils existed before bids and could not have been determined by any reasonable examination of the noticeable physical conditions of the project site prior to bidding; but, rather, their condition could only have been determined by a lengthy and costly subsurface

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exploratory program whereby the actual moisture content of these soils could have been determined and reported; that the degree of the natural moisture content of these soils could have been determined and reported by the defendants from the very subsurface borings they made prior to bids with very little added expense or trouble, but such information does not appear in the contract subsurface report given to the plaintiff and other bidders; that the contract documents, including the subsurface investigation report, available to the plaintiff as well as other bidders prior to bids in no way indicated the real unsuitable nature of these soils or the high natural moisture content of these soils; that while the soil subsurface report did indicate that some of the cut materials would be "moist", "damp" or "wet", this in no way indicated that these soils would pose any considerable problem or that the soils could not be dried, compacted and used according to contract specifications and in a practicable manner and within the contract time limits; that these soils in their undisturbed natural state would appear sound but when disturbed by construction equipment would have and did have the quality and tendency of turning into a viscous fluid; that the density and compaction tests conducted or not conducted during the course of construction evidenced the foregoing; and, that the plaintiff built and stabilized both the cut and fill areas by the only method possible since compaction of these soils could not be achieved, namely, using the "sandwich method" of constructing the fills; that this method of performance, while dictated by the actual conditions encountered after the project began, was in no way indicated to be necessary or specified in the contract documents.

(b) That in the considered opinion of these two experts, based on their review of the contract documents, their review of actual job records, and in particular, their review of the actual job conditions while

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the project was being built, the plaintiff encountered shortly after beginning construction on this project and during the progress of the work actual subsurface conditions at the site which differed materially from those conditions indicated in the contract, which conditions the plaintiff could not have discovered by a reasonable examination of the site; and, that these changed conditions necessarily caused a material increase in the plaintiff's cost of performance of all unclassified excavation work required for the construction of this project over that which would have reasonably been expected based on the contract documents.

(c) That while the project area did have a significant amount of normal annual rainfall, the rainfall which occurred during the life of this project merely posed a minor aggravation to the major problem; that the soils in their natural undisturbed state were too wet to handle according to contract requirements even with a minimum rainfall; and, that as clear and convincing evidence of the foregoing, during the months of June through October, 1973, the project experienced exceedingly less rain than was normal for those months and for any months in that area, yet the plaintiff's production was minimal and limited to the construction of fills only when it had a source of rock.

(27) That the plaintiff's job superintendent (now no longer employed by the plaintiff) who was on the project throughout the construction testified and used Plaintiff's Exhibit 22 to illustrate his testimony and based on said testimony the Court finds as follows:

That Exhibit 22, introduced and received in evidence was a "profile" of the project reflecting the heights of cuts and depths of fills. That a normal construction operation as was indicated in this contract, would have allowed the plaintiff to move the material from the closest cut to the nearest fill. At the beginning of the job in the summer of 1972 this was possible because the material from the initial top of the cuts was relatively dry but also was comprised of rock as well as soil, a mixture which could be used for embankment; however, subsequent to the winter shut-

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down of February and March, 1973, the plaintiff encountered extremely wet material which could not be utilized because the moisture content of the soils was so great that compaction was impracticable, if not impossible. That this site condition required the plaintiff to disrupt its normal construction operation by having to move men and equipment from one area to another in an attempt to allow the excavated material to dry so it could be used; however, when equipment was returned to these same areas the weight of the equipment would cause the material to pump, and water was again forced to the top of the working area thereby causing total disruption again. That the plaintiff was thereby restricted and prevented from making reasonable hauls, in fact, the plaintiff was required to move approximately one and one-half miles to Winding Stair Gap to uncover rock in order to sandwich the fills. That this was not only necessary to build up the embankment but was necessary to allow the movement of equipment through the fill areas. That the plaintiff's equipment constantly mired up and became stuck in the fill areas which further disrupted the work. That the plaintiff continually requested the defendants to allow the wet material to be wasted and replaced by borrow material that could be properly used in embankments, but these numerous requests from the plaintiff to the defendants from June, 1973 until October, 1973 were denied, the defendants contending the material was not unsuitable.

That the plaintiff in an effort to move material over the wet fills even sought to haul half loads which was more expensive and a much slower operation, and resorted to the use of draglines resting on huge mats to remove the wet material from the various cuts.

That the plaintiff had more than enough equipment on the project to complete the first phase on time or October 1, 1973, and even had planned a night operation but the wet materials encountered and required by the defendants to be used prevented the plaintiff from complying with the intermediate completion date; in fact, the plaintiff was ninety percent (90%) complete with the first phase of the project in June, 1973.

That the rain during the construction did not affect the

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soils except when drying was attempted. That cuts are graded on an angle which allows rain to drain off and any rain that was absorbed does not disrupt normal working conditions since this top two or three inches of wet material can be bladed off and dry soil again encountered.

That a site inspection would not reveal the wetness of the subsurface soil since the first six to twenty feet of cut material was usually suitable material; but, that the material below this suitable material contained a high moisture content that prevented the plaintiff from using it as embankment material in a practicable manner when the contract documents specified all material was suitable and surplus material was to be compacted in the future east-bound lane.

That the plaintiff's former job superintendent testified further as follows:

- (a) The expense of grading major portions of the project was materially greater than would have been the case if the natural moisture content of all of the soils had been at or about optimum as determined by the Proctor test.
- (b) The contract required the material excavated from the cuts to be used for building the fills.
- (c) The presence of soils with moisture contents materially greater than optimum affected the embankment costs as well as the excavation costs.
- (d) Excavation of the soils from the cuts, the transportation and placement of such in fills, and the attempted compaction of such materials tended to turn them into mud and to cause them to lose strength.
- (e) The soils were frequently too muddy for the successful operation of any type of equipment.
- (f) Operations in mud increased the wear and tear on the equipment, and thus led to higher costs.
- (g) Cuts at times had to be excavated in piecemeal shallow layers, so the freshly uncovered material would have an opportunity to dry before being removed.

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(h) Material placed in the fills often had to be left undisturbed for days while it was undergoing further drying and was regaining the strength lost through handling.

(i) Constant and disruptive moves of men and equipment from one cut or fill to another was necessary in order to keep the job going.

(j) Attempts to obtain the requisite degree of soil density by rolling each newly placed layer of embankment, without tilling or resting the material, was unsuccessful more often than not. Yet, tilling and rolling the material quite often made it more unstable.

That the plaintiff's job superintendent who has had many years experience in mountain road construction in West Virginia has never encountered any material that compared to that encountered on this project in Macon County. That plaintiff's job superintendent also used 8mm color film taken September 16, 1973 to illustrate his testimony which reflected the extremely wet material, deep ruts in the fill area from equipment, the use of draglines, and massive drainage ditches constructed by the plaintiff which did not and could not significantly drain the water from the material being excavated.

That subsequent to August 15, 1973, the date of plaintiff's claim letter, a meeting was held on the project site among employees of the plaintiff.

At this meeting during the latter part of September, 1973 or early October, 1973 the job foremen of the plaintiff were instructed to keep separate records for normal conditions and conditions as were being encountered.

That the plaintiff had always during this project maintained detailed daily labor and equipment reports. That the daily reports reflected the total hours of all equipment and labor for a particular day and reflected what the men and equipment were actually doing, i.e., unclassified excavation, force account, blasting, etc. That the foremen and the job superintendent were instructed to use their judgment from experience in analyzing what work could have been

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accomplished during the same period under normal conditions, thereby arriving at the hours equipment and men were actually engaged in the changed condition separate and apart from the total hours of men and equipment recorded daily. Additionally, if two pieces of equipment were required to accomplish what one could have done under normal conditions, then one-half of the equipment was charged to the changed condition.

That these daily labor and equipment reports, fourteen (14) volumes, were reviewed each night by the job superintendent for their accuracy.

That these daily reports are extremely important to plaintiff because they tell him how to bid his next project, i.e., what can be accomplished by a certain number of men and equipment in a given period.

(28) That Dallas L. Wolford, Vice President of the plaintiff, identified the plaintiff's verified claim letter of October 6, 1975 addressed to Mr. Billy Rose, State Highway Administrator, said claim letter being identified as Tab 43 of Change Condition Section of Plaintiff's Exhibit 15 which was received in evidence. From the testimony of Mr. Wolford the Court finds as follows:

That Mr. Wolford reviewed the plaintiff's verified claim letter in detail which outlined the plaintiff's claim and the reasons therefor. That the plaintiff's claim letter of October 6, 1975 was in accordance with and complied with North Carolina General Statute 136-29.

That the plaintiff in its claim letter and for the purposes of this action claimed the following as due it for conditions encountered at the project site that differed materially from those anticipated by the contract documents and which a reasonable site investigation would not reveal:

- (a) Extra cost of demobilization in the amount of Thirty-one Thousand Twenty-six and No/100 (\$31,026.00) Dollars caused by the changed condition. That normally this cost is charged to a new job but this project was cancelled prior to completion thereby requiring the plaintiff to unexpectedly have to ship

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and store its equipment at its area shop in Charleston, West Virginia rather than to another job, said costs being incurred from freight, loading and unloading, and lowbay operations.

(b) Cost of rock borrow as a result of the changed conditions in the amount of Eighty-two Thousand One Hundred Thirty-nine and 24/100 (\$82,139.24) Dollars. That this rock material was used to replace the removal of unsuitable undercut material in cut areas and was used to construct portions of the adjacent fills which was not a conventional method of construction. That the defendants by Supplemental Agreement No. 4 established a price for rock borrow and in fact, paid for a portion but not for all rock borrow necessary to build the embankments.

(c) Extra costs related to unclassified excavation incurred as a result of the changed conditions in the total amount of One Million One Hundred Seventy Thousand Two Hundred Seven and 26/100 (\$1,170,207.26) Dollars which included waste excavation from Black Gap and cross-hauling of rock from Winding Stair Gap. In substance, the extra costs of unclassified excavation arose from plaintiff having to use material from cut areas extremely distant from the fill areas in order to have sufficient rock to bring embankments to grade which forced the plaintiff to maintain long haul roads, obtain select material, haul over adverse grades and increase its hauls during the worst construction season. In general, the unclassified excavation change condition claim was calculated and based on the following conditions encountered:

- a. Unsuitable material
- b. High water table
- c. Move in 2 large draglines
- d. Install wide tracks on dozers
- e. Bring in tandem powered scrapers
- f. Use only rear dump trucks with non-spin differentials

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- g. Unusual number of large springs
- h. Rock borrow to get fill started
- i. Under cut of 6' in narrow cut
- j. Material could only move one direction to waste area thru two bad fill sections
- k. Rock borrow for haul road
- l. Adverse 6% grade - for return and borrow
- m. Narrow waste area - caused rehandling
- n. Overrun in excavation and underdrain
- o. Draglines had to work on mats
- p. Additional time required to perform overrun quantities

(d) Liquidated damages withheld of Fifteen Thousand Five Hundred and No/100 (\$15,500.00) Dollars.

That the completion date of October 1, 1973 for the first phase of the project would have been met by the plaintiff had it not encountered the changed condition and been granted the proper extensions of time.

That the defendants did not demand or request in writing that the plaintiff furnish a cost breakdown on its verified claim prior to the claim hearing but on the contrary had theretofore informed the plaintiff that keeping of records on the changed condition would be of no benefit.

That the defendants ignored the opportunity to review the record keeping of the plaintiff after changed conditions notice of August 15, 1973.

That change condition cost was set up particularly for the project after August 15, 1973, and although the defendants were informed records were available, no review or inspections were ever made by the defendants after October 2, 1973.

(29) That on August 15, 1973 the plaintiff afforded the defendants ample and written notice of this differing site condition claim; that both prior to that date and subsequent to that date, the plaintiff maintained daily cost records of the cost of performing its unclassified excavation work which substantially complied with the contract requirements relating to cost of work affected by any changed

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condition; that these daily cost records recorded in detail on an hourly and daily basis what equipment was being operated, by whom, performing what aspect of the unclassified excavation work, and the locations on the project where they were working; that as to their details, these cost records maintained by the plaintiff exceeded the force account requirements; that these cost records maintained by plaintiff were available throughout the project to the defendants for their review both prior and subsequent to August 15, 1973; and the defendants were given the opportunity to supervise and review the keeping of these records as is done in force account work; but, that notwithstanding the plaintiff's written notice and claim of a changed condition to the defendants on August 15, 1973, the defendants thereafter failed to promptly respond to the plaintiff's claim and, in fact, even encouraged the plaintiff not to keep such cost records as to the unclassified excavation work in general; that the defendants thereafter did not avail themselves of the opportunity to supervise and check the cost records because they did not agree that the plaintiff had encountered a changed condition under the terms of the contract; and, that the defendants had been aware of the conditions of which the plaintiff complained for a considerable time prior to August 15, 1973, so an investigation by the defendants of such changed conditions as claimed would have served no useful purpose.

(30) That the actual cost of the plaintiff performing its unclassified excavation work after August 15, 1973, was computed in the following manner and according to Force Account Method of Payment as established in the contract:

(a) The payrolls of those laborers and foreman working in the unclassified excavation work were given to the defendants weekly throughout the job. The hours in any given day that a named laborer or foreman was working on unclassified excavation work were recorded in the plaintiff's daily records which were available to the defendants as heretofore stated. These hours could be and were matched and cross-referenced from the weekly payrolls and the daily reports. Since the wage rate of each named laborer or

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foreman was accounted for in the payroll reports, and since the hours each named laborer worked on the unclassified excavation work was recorded in the foreman's daily reports, the compilation of the total labor costs related solely to the unclassified excavation work was compiled from August 15, 1973 until the completion of the unclassified excavation work.

(b) The hours each piece of equipment was performing the unclassified excavation work were recorded daily on the daily reports. If any given piece of equipment only operated a certain number of hours each day, then the operating hours were recorded separately from the hours that equipment was idle during the day. In computing the total equipment cost as per Force Account Requirements, the plaintiff applied the rental rates as specified by the applicable schedule published by the Associated Equipment Distributors. The equipment rates were charged on an hourly basis applying 1/176th of the applicable AED monthly rate for each hour of operation on unclassified excavation work. This method was used since some equipment was used on items other than unclassified excavation work during a given month and some equipment was working night shifts as well as day shifts which is not contemplated nor provided for in the applicable AED monthly schedule.

(c) The only materials used and charged as per force account requirements in the computation of the unclassified excavation work after August 15, 1973 was blasting materials for the excavation of rock.

(d) Equipment and labor time used and charged in the rock borrow operation was kept separately and not included in the unclassified excavation work account.

(e) Based on the foregoing, the total cost of the plaintiff's unclassified excavation work performed after August 15, 1973 was accounted for as follows and as per the dictates of the Force Account Work requirements of the contract:

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1. Total Labor	\$268,628.85	
Plus 30%	80,586.50	\$ 349,208.41
2. Bond, Insurance & Taxes:		
FICA	5.85%	
N.C. Unemployment	3.00%	
FUTA	.58%	
Liability	3.00%	
\$268,628.85 labor costs x		
12.43% = \$33,389.70		
Bond - \$641,209.73 at \$3.50/		
\$1000 =		\$ 2,244.23
Total Bond, Insurance		
& Taxes		\$ 35,633.93
Plus 6%		2,138.04
		\$ 37,771.97
3. Materials	\$ 69,240.60	
Plus 15%	10,386.09	\$ 79,626.69
4. Equipment		\$ 1,063,926.20
 TOTAL COST		 \$ 1,530,533.27

(f) In arriving at the extra costs the plaintiff incurred in performing its unclassified excavation work as a result of the changed condition, however, the plaintiff computed and allowed the defendants the following credits against these total costs of One Million Five Hundred Thirty Thousand Five Hundred Thirty-three and 27/100 (\$1,530,533.27) Dollars:

1. The unclassified excavation quantities performed after August 1, 1973 and for which the plaintiff was paid the contract unit price of \$.79/cubic yards: 1,125,756 cubic yards time \$.79/cubic yard = \$889,323.54.

2. Further excavation work on the project was

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cancelled by Change Order 8 which reduce the contract quantities. In connection with this reduction in quantities and this change order, the plaintiff was allowed \$176,268.97 because of the increase in his bid unit cost due to the under-run of the unclassified excavation quantities. Accordingly, this figure was pro-rated and allocated based on those quantities performed prior to August 1, 1973 as against those quantities performed after August 1, 1973 to arrive at the proper credit the defendants should be allowed on the increase in the unit price payment made to plaintiff for the quantities of unclassified excavation performed after August 1, 1973. This figure was computed properly as \$84,306.29.

(g) Thus, the total extra costs incurred by the plaintiff in performing its unclassified excavation work after August 15, 1973, when the proper credits are allowed the defendants is: \$556,903.44.

(31) That the plaintiff accounted for and presented two other methods of computation of its extra costs incurred in its unclassified excavation work. The first other method presented consisted of the extra labor and equipment time and resulting costs as estimated by them and reached on a daily basis to be the "extra effort" necessitated by the changed condition as to the unclassified excavation work. These estimated "extra effort" costs, recorded from October 1, 1973 until the unclassified excavation work was complete, were reasonably comparable to the actual extra cost incurred from October 1, 1973 until all classified excavation was completed. The remarkable nature of this comparability is that the plaintiff's foremen on daily basis when recording these estimates could in no way know what the ongoing actual costs were or would be since the final quantities and payments and credits could not be ascertained until long after the completion of the project. While this method of computation was subjective in nature and probably not in as complete compliance with the details of force account accounting as the computations accepted by

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this Court, the comparability of the final extra costs are a tribute to and substantial evidence of the competence and experience of plaintiff's fore men and their record keeping.

That the second other method of computation of the total extra costs presented by the plaintiff was the same as the one which this Court recognizes except that all equipment was charged on a monthly basis at monthly AED rates and then additional hourly charges were added for that same equipment which engaged in night shift operations. This method would have resulted in the plaintiff being due approximately Sixty Thousand and No/100 (\$60,000.00) Dollars more in extra costs related to the unclassified excavation work. Since the applicable AED schedule does not address itself to this question, this court finds that the more logical manner for charging the equipment would be on an hourly basis as was done in the method accepted by this Court. In this way, the defendants could not be overcharged.

That it should probably be noted that the plaintiff claimed and presented evidence that it was entitled to the monthly rental rate cost of equipment based on the applicable AED rates during two (2) months of 1974 when the project was shut down with the knowledge and consent and acquiescence of the defendants. This equipment remained present on the project but was idled for those two months and not used in any unclassified excavation work. The total applicable AED rental for this equipment for these two months was Three Hundred Eighty-two Thousand Seven Hundred Eighty-six and No/100 (\$382,786.00) Dollars. This Court finds and concludes that these extra costs are not reimbursable to the plaintiff and, of course, are not included in those extra costs allowed.

(32) That in the middle of July, 1973, the plaintiff advised the defendants that it had to conduct a rock borrow excavation from outside the construction limits in order to complete the fills immediately adjacent to the Black Gap cut and the undercut area in order that the materials excavated from the cut could be hauled over the fill. The defendants agreed that this was necessary for the plaintiff

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to do, but alleged that the plaintiff was not entitled to any extra costs for performing this rock borrow operation although acknowledging that the materials from the Black Gap cut were unsuitable and could not be used in the adjacent fills and undercut area which the plaintiff proposed placing this rock borrow into. The plaintiff notified the defendants that it was entitled to the extra cost of this operation over and above the bid price of \$.79/cubic yard for unclassified excavation since this was borrow from outside the construction limits. Accordingly and based on the plaintiff's claim, the defendants cross-sectioned the rock borrow area prior to the time the plaintiff excavated this borrow rock from it.

Subsequently, when it became obvious to the defendants that additional rock borrow would be required to complete the substantial undercut remaining to be performed in Black Gap, it directed the plaintiff to do so at a negotiated and agreed upon price of \$3.98/cubic yard. A supplemental agreement was entered into whereby the plaintiff was to be paid \$3.98/cubic yard for this rock borrow at a stipulated quantity of 5,300 cubic yards. In fact, however, and without another supplemental agreement being entered into, the plaintiff performed at least an additional 6,350 cubic yards of rock borrow after performing the initial 5,300 cubic yards called for in the supplemental agreement, and plaintiff was paid for this additional rock borrow at the previously established price of \$3.98/cubic yard. Thus, the plaintiff performed and was paid for a total of 11,650 cubic yards of rock borrow at \$3.98 per cubic yard or a total of Forty-six Thousand Three Hundred Sixty-seven and No/100 (\$46,367.00) Dollars for this work. For payment purposes, the defendants measured the amount of rock borrow used subsequent to the supplemental agreement by measuring the size of the undercut area rather than measuring the quantities taken from the borrow cut area itself as was provided for in the supplemental agreement and the Standard Specifications of the contract as applies to "Borrow Excavation." This method of measurement in fact used by the defendants was improper and could not have and did not account for the rock borrow placed in the

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undercut area which displaced and sunk beneath the undercut grade. Nevertheless, after all rock borrow had been removed from the rock borrow area, all of which rock was used in the undercut area of the Black Gap cut or in the fills immediately adjacent to such cut, this rock borrow area was cross-sectioned by the parties and compared with the original cross-sections which had been made by the defendants in the middle of July, 1973, and these measurements substantiated that a total of 33,688 cubic yards of rock borrow was required to complete the backfill of the undercut in Black Gap and complete the fills immediately adjacent thereto less 1,400 cubic yards used by plaintiff for a haul road from the borrow pit to the fill and adjacent undercut area. Accordingly and as a direct result of there not being sufficient suitable material to complete the Black Gap fills and backfill the undercut area, the plaintiff was required to use an additional total of 20,638 cubic yards of rock borrow in this area but for which the defendants failed and refused to pay him although a contract price was negotiated and established between the parties for these rock borrow quantities. Based on the foregoing, the plaintiff has been entitled to compensation for the additional rock borrow cut area in the amount of 20,638 cubic yards x \$3.98/cubic yards, or additional total compensation for rock borrow quantities in the amount of Eighty-two Thousand One Hundred Thirty-nine and 24/100 (\$82,139.24) Dollars. The plaintiff is entitled to this additional payment pursuant to the terms of Section 26 entitled "Borrow Excavation" of the Standard Specifications of the contract and the agreed upon price between the parties.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the court makes the following Conclusions of Law:

...

3. That the contract documents furnished the plaintiff by the defendants consisting of Standard Specifications, Special Conditions, Plans and Subsurface Information were material representations and indications upon which the plaintiff was justified in relying including but not limited

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to, that the unclassified excavation in excess of 4,000,000 cubic yards would be suitable material and practicable to use for embankment construction and that the materials excavated could be used in the fills within the balance points indicated and compacted to meet specifications all within the time limits of the contract documents. Contrary to the foregoing, however, most of the materials excavated were in fact unsuitable and impracticable to use for embankment construction and the excavated materials quite often could not be used within the balance points as indicated in the plans. Rather, the plaintiff had to resort to a "sandwich method" operation of construction heretofore described which included having to excavate both rock and less unsuitable earth materials from areas well outside the balance points as shown and cross-haul these materials throughout the project in order to complete its embankment construction.

4. That the plaintiff made a reasonable site investigation prior to bidding and the condition of the in place soils could not have been discovered by reasonable observable physical factors; that the plaintiff was not required to nor was there sufficient time to make its own subsurface investigation but was entitled to rely on the contract documents prepared and furnished by the defendants.
5. That the plaintiff did encounter subsurface or latent physical conditions at the site differing materially from those indicated in the contract documents which affected all of its unclassified excavation work.
6. That plaintiff encountered for the most part in its unclassified excavation work soils with natural moisture contents considerably greater than the optimum required for compaction, and this was contrary to what the contract documents indicated.
7. That the contract documents pertaining to the method and manner of achieving the compaction requirements constituted positive representations or indications to the plaintiff that the soils to be encountered would have natural moisture contents reasonably comparable to the optimum required for compaction as specified in the contract.

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8. That the contract intermediate completion date of October 1, 1973 was not possible to meet under any circumstances as a result of the plaintiff being required to use those soils excavated from the cut areas in the fill areas, which soils were not suitable and practicable for use in embankment construction.

9. That neither the defendants nor their employees acted in bad faith when furnishing the plaintiff the contract documents because they too were unaware of the unsuitable nature of the soils that would be encountered on this project, that both parties were mutually mistaken at the time they entered into this contract as to the conditions that were going to be encountered; and, that this was a mutual mistake of vital facts.

10. That the plaintiff encountered during the progress of the work conditions at the site differing materially from those indicated in the contract, which conditions could not have been discovered by a reasonable examination of the site and which conditions materially affected the cost of all of the unclassified excavation work and which changed condition also required the plaintiff to perform rock borrow work in quantities in excess of that which the defendants have heretofore paid plaintiff. In addition, this differing site condition caused the defendants to cancel a remaining major portion of its contract with plaintiff, and thereby caused the plaintiff to incur demobilization of equipment expenses which it would not have otherwise incurred had not the remaining portion of the contract been unexpectedly and prematurely cancelled.

11. That the plaintiff notified the defendants in writing of this differing site condition by letter of August 15, 1973.

12. That the plaintiff is entitled to an equitable adjustment for additional costs incurred in its unclassified excavation work as a result of the differing site conditions after August 15, 1973.

13. That the records of the plaintiff, and in particular, the daily labor and equipment reports, reflected the number of pieces of equipment on the job, the number of pieces of

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equipment operating, the task of each performed on a given day, the length of time each piece of equipment performed. Additionally, these daily reports reflected all laborers' on the job and the hours worked and on what task or operation. That the records maintained by the plaintiff during this project comply with the requirements of the contract prepared by the defendants and even exceeded those requirements. These records were maintained separately as to each item of work performed under the contract and in particular with reference to the unclassified excavation and in particular with reference to the unclassified excavation work. The time and equipment expended in the rock borrow operation were maintained separately and are not included in the costs of the unclassified excavation work.

14. That as a direct and proximate result of the plaintiff encountering differing site conditions the plaintiff is entitled to recover from the defendants as an equitable adjustment the following sums:

(a) For unclassified excavation	\$556,903.44
(b) For rock borrow	\$ 82,139.24
(c) For demobilization	\$ 31,026.00
TOTAL	<u>\$670,068.68</u>

16. That the plaintiff is entitled to recover from the defendants all liquidated damages withheld in the sum of Fifteen Thousand Five Hundred and No/100 (\$15,500.00) Dollars.

17. That the plaintiff, pursuant to the contract provision, is entitled to recover interest on the amounts set forth in Conclusions of Law 15 and 16 at the rate of five (5) percent per annum from March 23, 1975.

18. That the plaintiff submitted a verified claim letter and instituted this action all within the times and other requirements specified in N.C.G.S. 136-29.

19. That C. Page Fisher and Francis L. Holloway were witnesses for the plaintiff and testified in this civil action and were recognized by the Court as expert witnesses.

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20. That pursuant to North Carolina General Statute 7A-314(d), the Court in its discretion, concludes that the expert witnesses were required to be present during the entire trial of this matter, and as compensation and as allowance to each of the two expert witnesses of the plaintiff a witness fee of Sixty and No/100 (\$60.00) Dollars per hour while attending this proceeding and One Hundred Twenty and No/100 (\$120.00) Dollars per hour while testifying, such witness fees to be taxed as costs in this civil action. Copies of expert witnesses' statements are attached to this Judgment and incorporated herein by reference.

Upon the findings and conclusions the court ordered that plaintiff have and recover of defendant \$685,568.68, with interest at 5% per annum from 23 March 1975 and that defendant pay expert witness fees amounting to \$3,120. From the judgment entered, defendant appeals, noting 161 exceptions to the findings of fact and conclusions of law.

Attorney General Edmisten, by Special Deputy Attorney General Eugene A. Smith and Associate Attorney J. Christ Prather, for the North Carolina Board of Transportation defendant appellant.

Nye, Mitchell, Jarvis and Bugg, by R. Roy Mitchell and John E. Bugg, for plaintiff appellee.

MORRIS, Chief Judge.

Plaintiff appellee has moved for the dismissal of this appeal on the ground that appellant has violated the requirement of Appellate Rule 10(c) that the "grouping of exceptions under given assignments of error" be confined to a single issue of law so far as practicable. The appellant has listed 167 assignments of error based upon 168 exceptions to the findings of fact and conclusions of law in the trial court's order. Although the exceptions and assignments of error have been placed after each issue presented in its brief, appellant, for the most part, has neglected to identify or address them expressly in its argument under each issue. Thus it is virtually impossible to determine whether any exceptions have been abandoned for lack of argument. While we think plaintiff's position is well taken, we have chosen to discuss the questions raised by this appeal on their merits.

From a substantial record, the court made lengthy and detailed

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findings of fact. This Court must now determine whether those findings are supported by the evidence and whether they support the trial court's conclusions of law and order. *Graham and Son, Inc., v. Board of Education*, 25 N.C. App. 163, 212 S.E. 2d 542, *cert. den.* 287 N.C. 465, 215 S.E. 2d 623 (1975).

[1] Defendant has excepted to the trial court's findings that on 15 August 1973 the plaintiff afforded the defendant ample written notice of its claim of a "changed condition" at the work site. Defendant appears to contend that the notice was deficient in that it did not sufficiently detail the nature of the changed condition and the alteration in work procedures which would be necessitated.

In Blankenship Construction Company v. Highway Commission, 28 N.C. App. 593, 222 S.E. 2d 452, *disc. review denied* 290 N.C. 550, 230 S.E. 2d 765 (1976), this Court construed the notice requirement as contained in § 4.3A of the Standard Specifications for Roads and Structures (hereinafter "SSRS"), stating as follows:

In order to qualify for additional compensation under Sections 4.3A or 4.4(c), the Contractor is required to furnish the Engineer written notice of the alleged changed conditions. . . .

While the form of the notice -- written or oral -- may not be critical, the content of the notice must satisfy the underlying purpose of the notice requirement In our opinion the purpose of the notice requirement of Section 4.3A is to apprise the Commission of the Contractor's belief that he has encountered "work conditions at the site differing materially from those indicated in the contract" for which he is entitled to an "equitable adjustment."

Id. at 607, 222 S.E. 2d at 461.

We find that the written notice given by plaintiff clearly apprised the defendant of the claim of a changed condition at the work site in compliance with § 4.3A of the SSRS. Plaintiff's letter of 15 August 1973 explicitly advised the defendant of its claim and demand as follows:

Our contract with you has a changed condition clause. With the schedule demanded and the superior knowledge of

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the Highway Commission and its design engineers, the contract was based on the fact that the soils could be compacted. We believe that the excessive moisture in the soils of this project created by excessive rain and other reasons, the drainage characteristics and soil conditions constitute a changed condition requiring that the Highway Commission grant us equitable adjustment and extension of time.

...

Pursuant to the specifications and in order to further protect our position in this matter we hereby notify the commission in writing that we are now having and have had since the beginning of this project, a changed condition of which employees of the commission have had knowledge.

In its letter plaintiff further requested a meeting to see if the parties could reach an agreement concerning an equitable adjustment and time extension for a changed condition.

By letter dated 18 September 1973 defendant advised plaintiff that it did not concur with the claim of a changed condition as presented in the 15 August 1973 letter (and as also presented in a joint meeting held 17 September 1973) and denied plaintiff's request for an adjustment in unit prices or for a time extension. This letter is, of course, a written acknowledgment by the defendant that the plaintiff had informed it of the belief that there had been encountered work conditions at the site differing from those indicated in the contract for which the contractor was entitled to an equitable adjustment.

We find nothing in § 4.3A, or in its interpretation by the *Blankenship* Court, which would support the defendant's contention that the contractor in this initial notice was required to spell out in detail the exact nature and extent of the unclassified excavation work it was claiming under a changed condition. At this point in its claim, plaintiff was not required to itemize the fine points and particulars which subsequently would be necessary in the proof of its claim. All that was necessary at this juncture was a "forceful indication of changed conditions and demand for equitable compensation." *Blankenship Construction Company v. Highway Commission*, supra. The plaintiff's letter of 15 August 1973 fully supports the trial court's

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finding that ample written notice was provided in accordance with the contract.

[2] Defendant next argues that the trial court erred in granting plaintiff recovery on the basis of "changed conditions" when different theories and claims were presented to the State Highway Administrator. Defendant is correct in its contention that this Court in *Inland Bridge Company, Inc. v. Highway Commission*, 30 N.C. App. 535, 227 S.E. 2d 648 (1976), held that under N.C.G.S. 136-29, a party may not develop theories of recovery in Superior Court *in addition* to those set forth in the claim filed with the State Highway Administrator. However, the defendant's reliance upon the opinion in *Inland Bridge* is misplaced. The Court's decision in that case was based upon the following:

Plaintiffs' whole claim before the Commission was for misrepresentation. Had they desired to sue under the provisions in the SSRS incorporated into the contract, which provides for claims based on changed conditions, extra work, or reclassification of materials, it was necessary for them to elect to do so prior to the trial in the Superior Court. *Construction Co. v. Highway Comm.*, 28 N.C. App. 593, 222 S.E. 2d 452 (1976).

Id. at 547, 227 S.E. 2d at 655.

Unlike the contractor in *Inland Bridge*, in the case at hand the plaintiff contractor did submit in its verified claim letter dated 6 October 1975 a claim for increased compensation due to the encountering of changed conditions. In this letter individual claims were separated into three groups with detailed explanation and supporting data, to wit: contract termination costs; certain excavation costs involving rock borrow, waste excavation, and slide excavation; and costs directly arising from changed conditions and/or defective design. While the tenor of the verified claim is that all categories of increased costs were brought about by the unanticipated conditions encountered, the plaintiff further encompassed the total claim under the last heading of "changed conditions" by the following:

For the purposes of this claim letter, we will state that the amount involved due to changed conditions and/or defective design and specifications, is \$814,494.81 plus any

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money not recognized as due the Contractor in other parts of this letter.

Thus, plaintiff, while identifying and categorizing certain claims for the benefit of the defendant, made it abundantly clear that any such claims not recognized in the separate categories as presented were to be included in the overall "changed conditions" claim. Plaintiff did not pursue or recover at trial on a theory which had not been previously presented to the Administrator. Defendant's further contention, that at trial plaintiff could only attempt to prove its compilation of damages in the one method presented to the Administrator, we find to be without merit.

[3] Appellant's next assignment of error involves a fundamental question to be resolved in this action: Whether the plaintiff-contractor in fact and in law encountered "changed conditions" at the work site so as to entitle it to an equitable adjustment in compensation from that specified in the contract. Article 4.3A of the SSRS, incorporated into the parties' contract, provides in pertinent part as follows:

Should the Contractor encounter or the Commission discover during the progress of the work conditions at the site differing materially from those indicated in the contract, which conditions could not have been discovered by reasonable examination of the site, the Engineer shall be promptly notified in writing of such conditions before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause a material increase or decrease in the cost of performance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly.

Defendant appellant does not appear to contest that excessive moisture and unstable soils were in fact present at the work site as contended by plaintiff. Abundant evidence was presented at trial of the existence of excessively wet earth materials which forced plaintiff to resort to construction of the fills by means of the "sandwich method" of alternating layers of rock and earth, since the soil would not dry back to achieve the specified density when compacted. Furthermore, plaintiff's later difficulty in obtaining rock even to continue in this time-consuming and expensive method of construc-

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tion was essentially unchallenged by defendant. Although defendant initially refused plaintiff's request to waste the unsuitable material encountered in the Black Gap cut, it now admits on appeal that there was no question but that the material was too wet in its natural condition for the construction of roadway embankments. All parties acknowledge that the "cave-in" or "slide" in the eastern project, which was caused by wet and unstable soils, necessitated a redesign of this portion of the project and its eventual cancellation.

Since the existence of the above conditions is not in controversy, the basic issue before this Court is whether this situation constituted "work conditions at the site differing materially from those *indicated in the contract*." Defendant does not argue on appeal, nor do we find, that the site conditions should have been discovered by reasonable examination of the area.

In essence the trial court concluded from the facts found that the parties were mutually mistaken at the time of bid as to the soil conditions which actually existed. Quoting extensively from the contract, the court found that the presence of these conditions could not have been anticipated from the contract itself. The trial court held that the contract provisions concerning soil types, compaction and proof rolling requirements, and specifications applicable to embankment construction constituted material representations that the soil conditions present at the work site would be suitable for use as indicated. The contract explicitly represented that for the most part "[s]oils should pose no great problems on this project" Additionally, the implication that no unsuitable material would be encountered was suggested by the deliberate deletion of Section 22, the standard provision which defines what type of material is to be classified as unsuitable. The court further found that the time period of just sixteen months which was allotted for completion of the entire project was an affirmative indication or representation that this work could be accomplished within the time prescribed. Based upon its finding of mutual mistake of fact, the court concluded that the plaintiff was entitled to an equitable adjustment for additional costs incurred as a direct result of the differing site conditions.

We hold the above findings and conclusions of the trial judge to be supported both by the evidence and the law. In reaching our decision we have considered the analysis of other jurisdictions, both federal and state, as well as our own North Carolina decisions, relat-

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ing to the interpretation of construction contracts containing the changed condition clause as found in Section 4.3A of the SSRS.

Contract design features, specifications and requirements have been held in several instances to constitute affirmative indications that the job could be accomplished in the manner designated in the contract and completed within the prescribed time limits. See *Southern Paving Corporations*, AGBCA No. 74-103, 77-2 BCA ¶ 12,813 (1977); *Foster Construction C.A. and Williams Brothers Company v. United States*, 435 F2d 873, 193 Ct.Cl. 587 (1970); *Ray D. Bolander Company, Inc. v. United States*, 186 Ct. Claims 398 (1968). The *Bolander* opinion, in considering a differing site condition claim, is particularly instructive as it dealt with detailed contract compaction requirements and other design features similar to those present in the contract now before us. This decision held that the contractor had a valid differing site condition claim based on the positive representations concerning the soil conditions as contained in the contract documents. The Court of Claims stated:

It would be equally inane to suppose that this article on compaction and all the specifications were in this contract for no purpose.

... There was a clear implication (or "indication," using the word in the "Changed Conditions" article) that these were soils capable of compaction to [the degree specified in the contract]

Even assuming, *arguendo*, that the provision on compaction was not a representation, it was at the very least misleading and ambiguous, and the consequences of that ambiguity are chargeable to the author.

Id. at 417.

In *Lowder, Inc. v. Highway Commission*, 26 N.C. App. 622, 217 S.E. 2d 682, *cert. denied* 288 N.C. 393, 218 S.E. 2d 467 (1975), a large overrun in undercut excavation occasioned by unexpected and excessive wetness was determined to constitute a "change condition" within Section 4.3A of the SSRS. In its decision the Court specifically stated that "[i]n our opinion the encountering of unexpected excessive wetness may constitute as much a change of condition as the encountering of unexpected rock." *Id.* at 644, 217 S.E. 2d at 696. The opinion held that certain contract proposals and plans, in this instance the

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location and quantity of undercut excavation, may constitute material representations which justifiably can be relied upon by a contractor. When confronted by conditions which significantly differ from those indicated to exist in the contract, the contractor may legitimately seek relief under the "changed condition" section of the contract.

Where parties labor under a mutual mistake as to vital facts, the contract, in the interests of fairness, should be flexible enough to permit an equitable adjustment.

The broad purpose of changed conditions clauses, and, indeed, the purpose of § 4.3A, is to encourage low, competent bids.

"Cost hazards are such in subsurface areas that qualified contractors, prior to the adoption of the article used in standard forms of government contracts, were obliged to make extremely high bids based on the assumption that the worst conditions conceivable would be met in the performance of the work. Drafters of contract forms foresaw greater economy to the government if contractors could be encouraged to bid upon normal conditions, with the assurance that they would be reimbursed in case of abnormal conditions actually encountered and to the extent that they actually increase costs. The revision of the costs due to conditions that are abnormal is accomplished by what the Changes article denominates an 'equitable adjustment'." Anderson, *Changes, Changed Conditions and Extras in Government Contracting*, 42 Ill. L. Rev. 29, 47 (1947).

To ignore this policy is to open the door to disastrous consequences for the State.

Id. at 645, 217 S.E. 2d at 696.

We conclude that the evidence amply supports the trial court's findings that the parties were mutually mistaken at the time they entered into this contract as to the conditions that were going to be encountered. In addition to the conditions which were indicated in the contract itself, as discussed above, the record is replete with evidence that the earth material prevailing at the work site was not anticipated even by the defendant. Defendant's Resident Engineer acknowledged that the 16 months allotted to plaintiff to complete its unclassified excavation work, as well as all sequential work, in fact was a rela-

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tively "quick completion date." Further testimony of this witness was to the effect that, notwithstanding the contract provision that for the most part "[s]oils should pose no great problems on this project. . . , " the soils did present a "considerable problem to this contractor from day one." The Resident Engineer, in discussing the Black Gap area, stated that "[i]t's an ordinary assumption that we made that the material coming out of the cut area was supposedly suitable, usable material;" while defendant, in its brief, now concedes that the material encountered in the Black Gap cut "was too wet in its natural condition for the construction of roadway embankments." Although the soils specialist tendered by plaintiff testified that knowledge as to the moisture content of the soil would have been the most important single piece of information in evaluation of these soils, no such documentation was present in the defendant's subsurface investigation for this project. This expert testified that in his opinion the contract documents, most particularly the subsoil investigation report, would not have alerted a reasonable and prudent contractor as to the soil conditions which were actually encountered.

Finally, we note that the plaintiff's bid for this project of \$5,311,450.82 was in line with the defendant's Engineer's estimate of \$5,205,141.67. This was also true of the parties' respective bid and estimate, \$3,370,930 and \$3,328,260, for the main bid item of unclassified excavation work. The foregoing is a significant indication that neither the plaintiff contractor nor the defendant had known of or anticipated the unstable and unworkable soil conditions which resulted in the ensuing cost overruns. Southern Paving Corporations, AGBCA No. 74-103, 77-2 BCA ¶12,813 (1977).

Based upon the above, we hold the trial court was correct in its determination that the contractor did encounter a changed condition from that indicated in the contract as provided in § 4.3A and was entitled to an equitable adjustment for additional costs incurred.

[4] Assuming the court was correct in its finding of a changed condition, defendant next argues that plaintiff is barred from recovery of additional compensation by its failure to maintain cost records in accordance with Sections 4.3 and 9.4 of the SSRS. Section 4.3 provides as follows:

In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged

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changed conditions, the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quantity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work.

Section 9.4 details the manner of payment for work done on a force account basis as follows:

1. Labor. For all labor and foremen in direct charge of the specific operations, the Contractor shall receive the base rate of wages (or scale) actually being paid by the Contractor for the class or classes of labor normally necessary to perform the work for each and every hour that said labor and foremen are actually engaged in such work, to which rate 30% will be added. Before beginning the work the Contractor shall file with the Engineer for his approval a list of all wage rates applicable to the work. Approval will not be granted where these wage rates are not actually representative of wages being paid elsewhere on the project for comparable classes of labor performing similar work, or where these wage rates include costs paid to or on behalf of workmen by reason of any fringe benefit.
2. Bond, Insurance, and Tax. For property damage, liability, and workmen's compensation insurance premiums, unemployment insurance contributions and social security taxes on the force account work, the Contractor shall receive the actual cost, to which cost 6% will be added. The Contractor shall furnish satisfactory evidence of the rate or rates paid for such bond, insurance, and tax.
3. Materials. For materials accepted by the Engineer and used, the Contractor shall receive the actual cost of such materials delivered on the work, including transportation charges paid by him (exclusive of machinery rentals as

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hereinafter set forth), to which cost 15% will be added.

4. Equipment. For any machinery or special equipment (other than small tools) including fuel, lubricants, cutting edges, all repairs and all other operating and maintenance costs (other than operator) plus transportation costs for equipment not already on the project, the Contractor shall receive the rental rates listed in the current schedule published by the Associated Equipment Distributors. When equipment is used for a period less than one month, the rental rate shall be computed on an hourly basis using an hourly rate which is 1/176 of the monthly rate. When equipment is used for a period of one month or more, the rental rate shall be on a monthly rate basis.

5. Miscellaneous. No additional allowance will be made for general superintendence, the use of small tools, or other costs for which no specific allowance is herein provided.

6. Compensation. The Contractor's representative and the Engineer shall compare records of the cost of work done as ordered on a force account basis.

7. Statements. No payment will be made for work performed on a force account basis until the Contractor has furnished the Engineer with duplicate itemized statements of the cost of such force account work detailed as follows:

- a. Name, classification, date daily hours, total hours, rate, and extension for each laborer and foreman.
- b. Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
- c. Quantities of materials, prices, and extensions.
- d. Transportation of materials.
- e. Cost of property damage, liability and workmen's compensation insurance premiums, unemployment insurance contributions, and social security tax.

Statements shall be accompanied and supported by receipt-

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ed invoices for all materials used and transportation charges. However, if materials used on the force account work are not specifically purchased for such work but are taken from the Contractor's stock, then in lieu of the invoices the Contractor shall furnish an affidavit certifying that such materials were taken from his stock, that the quantity claimed was actually used, and that the price and transportation claimed represents the actual cost to the Contractor.

The procedures under the foregoing provisions for obtaining additional compensation based on changed conditions were discussed in *Blankenship Construction Company v. Highway Commission*, 28 N.C. App. 593, 222 S.E. 2d 452, *disc. review denied* 290 N.C. 550, 230 S.E. 2d 765 (1976). The Court defined the basic obligations of the Contractor as (1) insuring that notice of its intended claim is given to the Engineer or Commission, (2) maintaining accurate and detailed cost records with the "particularity of force account records," and (3) providing the Commission the opportunity to supervise the keeping of its records. Construing the policy of Section 4.3, the *Blankenship* Court emphasized that the State must be given the chance to supervise and check records as the work progresses in order to protect itself from a claim based on inaccurate cost estimates.

As discussed heretofore, we agree with the trial court that sufficient notice of its intended claim was properly given by the plaintiff. We also find that accurate and detailed cost records were maintained during the course of the work and that defendant was given ample opportunity to oversee these records had it desired to do so.

The foreman's daily reports, maintained under the supervision and review of the plaintiff-contractor's job superintendent, constitute the base source and record of the contractor's cost of performing its unclassified excavation work. These reports, consisting of fourteen volumes, record the following information: weather conditions, the name of each operator and the particular piece of equipment he was operating, the actual hours each operator worked, the actual hours each piece of equipment was working, and the actual hours each piece of equipment might have been idled. On the back of each such report the accompanying information was recorded: the actual cut and fill station numbers where the equipment was working, usually the distances of the hauls, the quantity of unclassified excavation moved, and then any pertinent remarks with respect to the nature of the work

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tion material being encountered, and the repairs required for any piece of equipment which was idled as a result of a breakdown. Costs, including labor, equipment and material costs, were maintained on a monthly basis on the contractor's computer. Proper percentages in accordance with Section 9.4 were added to the labor and materials costs and for insurance, bond and taxes. Although the compilation of total costs presented at trial was prepared in part by later substituting the applicable AED equipment rate for the plaintiff's "in house" costs, the costs were maintained currently with the work performed. They required only a procedural rate substitution for the equipment costs upon defendant's request at any time to be in the form prescribed by Section 9.4. Plaintiff's costs for additional rock borrow required by the unstable soil conditions were established at a set unit price in a supplemental agreement covering rock borrow from the same source. Costs for demobilization of equipment, due to the unexpected termination of the work necessitated by the changed conditions, were submitted to defendant based upon the percentage of unclassified excavation not completed on the project.

The Area Engineer for the contractor, who was on the project during performance from two to three days each month, monitored and compiled the contractor's extra costs associated with the changed conditions. Concerning the accuracy of these records and compiled costs, defendant's Resident Engineer testified as follows:

I would agree that the contractor kept good account of where equipment was working and what it was doing, even prior to that time (the date of notice of changed condition), on those daily reports. I would agree that Groves kept pretty good records out on the job They kept good records on production rate out on the job If you were satisfied they were accurate records, as long as you had a daily record or when and where equipment was working, the dollar figures could be put on those records at any time. I don't have any reason to question their records about actually where equipment was, how many hours it was working and what it was doing each day.

With respect to the foregoing, the trial court made the following findings not excepted to by appellant:

That the plaintiff had always during this project maintained detailed daily labor and equipment reports. That the

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daily reports reflected the total hours of all equipment and labor for a particular day and reflected what the men and equipment were actually doing, i.e., unclassified excavation, force account, blasting, etc.

Although the above records and costs were maintained by plaintiff during the course of the work performed, defendant consistently declined any opportunity to supervise and check the records which it now contends are inadequate. Defendant's Resident Engineer testified that at the parties' cost records meeting of 2 October 1973, he was shown how the records were going to be kept. He acknowledged that, even though the plaintiff kept "pretty good records out on the job" and advised him that printouts on the costs from the daily records could be obtained on a weekly basis, he did not request the computer printout or review the daily records on a regular basis. Significantly, this same witness testified that since he did not consider the project work to be affected by any changed condition, "[a]fter the meeting I really wasn't too much interested in what he was going to do with his records." Not only did the defendant fail to request that plaintiff alter its method of record keeping during progress of the work, it actually encouraged plaintiff, by letter dated 4 October 1973, not to keep records as if by force account, asserting such documentation would be "impractical" and "not render anything useful to either party." We find the record fully supports the trial court's finding that the defendant ignored the opportunity to review the record keeping of the plaintiff after being given notice of the asserted changed condition on 15 August 1973.

Inasmuch as the record supports the findings that plaintiff did keep accurate and detailed records with the particularity of force account records and that defendant was in fact provided the opportunity to review these records, which opportunity it disregarded, we find this assignment of error to be without merit.

[5] We further find no merit in defendant's contention that the court improperly admitted into evidence plaintiff's Exhibits 18 and 19(b), respectively, consisting of the daily work reports and the total extra costs compilation based on these reports. For reasons discussed previously, Sections 4.3 and 9.4 of the SSRS present no bar to the admission of these documents. We also find the records and compilation admissible into evidence under the business entries exception to the hearsay rule.

The admissibility requirements for such documents were set forth in *Lowder, Inc. v. Highway Commission*, 26 N.C. App. 622, 217

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S.E. 2d 682, *cert. denied* 288 N.C. 393, 218 S.E. 2d 467 (1975): (1) the entries must be made in the regular course of business, (2) the entries must be made contemporaneously with the events recorded, (3) the entries must be original entries, and (4) the entries must be based upon the personal knowledge of the person making them. Records compiled under the above specifications are admissible into evidence since the circumstances indicate that they are sufficiently "reliable and trustworthy as to reflect accurately the actual costs incurred." *Id.* at 650, 217 S.E. 2d at 700.

Plaintiff's Exhibit 18, the foreman's daily reports, was the base source for the compilation of damages and recorded the labor and equipment hours expended in the unclassified excavation work. It meets the business entries exception to the hearsay rule in that (1) appellant's counsel stipulated they were original entries kept under the contractor's job superintendent's supervision, (2) the entries were made in the regular course of business, (3) the entries were made contemporaneously with the events recorded, and (4) the entries were based upon the personal knowledge of the persons making them. Their reliability and trustworthiness were acknowledged by defendant's Resident Engineer who testified that "Groves kept pretty good records out on the job" and that he did not have "any reason to question the records about actually where the equipment was, how many hours it was working and what it was doing each day." Plaintiff's Job Superintendent testified that he reviewed these labor and equipment reports each day for accuracy.

We find plaintiff's Exhibit 19(b), the compilation of costs, admissible for the same reasons discussed above. This document was based upon Exhibit 18. *See Lowder, Inc. v. Highway Commission, supra*. Since the costs for the unclassified excavation work had been maintained on plaintiff's computer at the time the work was performed, all that was necessary in its preparation was the recomputation of equipment costs from "in-house" rates to AED rates. This document also meets the tests of trustworthiness and reliability. We do not consider defendant's attempt to raise for the first time on appeal its objection to this exhibit as being a computer record.

[6] Defendant also assigns error to the court's ruling that the plaintiff was entitled to recover from the defendant all liquidated damages previously withheld. These damages were assessed pursuant to the following special provision of the contract:

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Liquidated damages of one hundred dollars (\$100.00) will be charged the contractor for each calendar day after October 1, 1973, that the project from station 1029+04 to station 30+00 (including -Y- lines and driveways) is not complete to the extent that the pavement is placed, the shoulders are constructed, the guardrail is installed, and two-way traffic is placed and then maintained on same.

Under this clause, plaintiff was assessed liquidated damages in the sum of \$15,500.00.

In *Reynolds Co. v. Highway Commission*, 271 N. C. 40, 50, 155 S.E. 2d 473, 482 (1967), the Court stated:

Obviously, as an elementary general proposition, a contractor is not liable under a clause for liquidated damages based on a time limit if his failure to complete the contract within the specified time was wholly due to the act or omission of the other party in delaying the work, whether by omitting to provide the faculties (sic) or conditions contemplated in the contract to be provided by him, or by those for whom he is responsible, or by interfering with the work after the contractor has begun, or otherwise. *Dunavant v. R.R.*, 122 N.C. 999, 29 S.E. 837; *United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 58 L.ed. 1294; Anno. 152 A.L.R., p. 1350; 22 Am. Jur., 2d, Damages, § 233; 25 C.J.S., Damages, p. 1096. The concept of justice back of the decisions appears to be that the other party should not be allowed to recover damages for what he himself has caused.

The record contains plenary evidence to support the trial court's finding that "the completion date of October 1, 1973 for the first phase of the project would have been met by the plaintiff had it not encountered the changed conditions and been granted the proper extensions of time." Defendant's Resident Engineer testified that as of 8 June 1973 the plaintiff was 90% complete on the first phase. However, it was at this point that plaintiff had depleted all available sources of rock and was left with soil which was too wet to be used without rock for embankment fills. Under these conditions, the contractor requested in several meetings that it be allowed to waste this unsuitable material. As testified to by the Resident Engineer, defendant denied the request, contending that the material was in fact suitable since it

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was indicated to be so in the contract. The plaintiff's request was denied even though the Resident Engineer later testified that at this same time the "material at Black Gap was wet when it came out of the cut . . . and it seemed to get wetter the further we went down into it." This witness also testified that if the contractor had been allowed to waste the material in June as he requested, there was no doubt he could have finished the project sooner, possibly by the 1 October completion date. Even when the project was behind schedule, the Resident Engineer stated that he was completely satisfied with the work effort being expended by the contractor. In the latter part of October defendant finally realized that the unsuitable soil in the Black Gap cut was preventing any completion of the project, and plaintiff was allowed to waste this material as he had requested months earlier.

By its refusal to allow plaintiff to waste the unsuitable material when initially requested, coupled with its knowledge that the wet, unstable soil could not be utilized as indicated in the contract, defendant clearly waived any expectation of adherence to the contract schedule. *See, Graham and Son, Inc. v. Board of Education*, 25 N.C. App. 163, 212 S.E. 2d 542, *cert. denied* 287 N.C. 465, 215 S.E. 2d 623 (1975). On the basis of these facts, defendant was not entitled to assess liquidated damages and the court properly ordered their recovery by plaintiff.

[7] By its next assignment of error, defendant contends the trial court erroneously calculated the credits for payments made by the Board of Transportation to the plaintiff-contractor. As to the finding submitted on appeal which defendant now asserts would have been a correct calculation of credit, we note at the outset that the record contains no request by defendant to the trial court to make such a finding. Defendant should have requested the court to make the finding and excepted to its failure to do so. This proposed finding of fact is therefore not before us for consideration. *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209 (1961). Although defendant has properly included in its brief the assignments of error and exceptions to the findings of fact in which the trial court calculated the disputed credits, it has completely failed to afford this Court any citations of authority or the portions of the record upon which it relies to support its argument. Accordingly, under Appellate Rule 28(b) (3) its argument is deemed abandoned. *State v. Minshew*, 33 N.C. App. 593, 235 S.E. 2d 866 (1977); *State v. Tuttle*, 33 N.C. App. 465, 235 S.E. 2d 412 (1977). This Court will

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not “fish out” an appellant’s exception which is not properly presented. *Lee v. Tire Co.*, 40 N.C. App. 150, 157, 252 S.E. 2d 252, 257 *dis. review denied* 297 N.C. 454, 256 S.E. 2d 807 (1979). Notwithstanding, our review of the record discloses no valid reason to alter the trial court’s finding.

We conclude that the court’s findings of fact are supported by competent evidence and support the court’s conclusions of law.

[8] We do, however, find merit in defendant’s contention that the court erred in awarding to plaintiff compensation for its expert witnesses. We are aware that the trial court did find that the expert witnesses “were required” to be present during the entire trial. However, as conceded by plaintiff in its brief, no subpoenas for these witnesses are to be found in the record. Under existing case law, the trial judge was therefore without authority to tax the expert witness fees against appellant as a portion of the costs. *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972), *aff’d* 286 N.C. 331, 210 S.E. 2d 260 (1974); *Siedlecki v. Powell*, 36 N.C. App. 690, 245 S.E. 2d 417 (1978); *Redevelopment Commission of Winston-Salem v. Weatherman*, 23 N.C. App. 136, 208 S.E. 2d 412 (1974).

We have considered defendant’s remaining assignments of error and find them to be without merit.

That portion of the judgment ordering the defendant to pay expert witness fees is reversed. The remainder of the trial court’s judgment is affirmed in its entirety.

Affirmed in part and reversed in part.

Judges CLARK and ERWIN concur.

Judge ERWIN concurred in this opinion prior to 31 October 1980.

IN RE: FORECLOSURE OF DEED OF TRUST RECORDED IN BOOK 911, AT PAGE 512, CATAWBA COUNTY REGISTRY

No. 8025SC309

(Filed 16 December 1980)

1. Mortgages and Deeds of Trust § 33.1; Husband and Wife § 15— property held as tenants by entirety — foreclosure and sale — proceeds held as entirety property

When husband and wife voluntarily sell and convey real property owned by

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them as tenants by the entirety, the proceeds of sale are considered personal property, and the husband and wife are tenants in common with respect to the ownership of the proceeds of the sale; however, when real property held by husband and wife as tenants by the entirety is foreclosed and sold pursuant to a power of sale in a deed of trust, the funds so generated retain the characteristics of the underlying property and are thus constructively held by the entirety. The claim of the I.R.S. in this case was a lien only against property owned solely by the husband, and the I.R.S. had no lien against the land which was the subject of the foreclosure since it was entirety property.

2. Mortgages and Deeds of Trust § 25— foreclosure and sale under power of sale — transaction not voluntary

A foreclosure and sale pursuant to a power of sale in a deed of trust is not voluntary.

3. Mortgages and Deeds of Trust § 33.1— provision for foreclosure by exercise of power of sale — no intent that proceeds be held as tenants in common

Language in a deed of trust providing that the surplus proceeds from a foreclosure sale could be paid "to the Grantors, or either of them, or to their legal representatives" did not indicate that the parties intended that the surplus proceeds on the occasion of foreclosure were to be held by them as tenants in common.

Judge VAUGHN dissenting.

APPEAL by the United States of America, on behalf of its agency, the Internal Revenue Service, from *Collier, Judge*. Judgment entered 20 December 1979, in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 October 1980.

On 18 May 1979, William J. Houch, Substituted Trustee under a deed of trust recorded in Book 911 at page 512 of the Catawba County Registry, foreclosed and sold at private sale real property conveyed by the deed of trust in accordance with a power of sale contained therein. The owners in default of the real property were Frank S. Cline and Sally S. Cline, husband and wife, who held the property as tenants by the entirety. The property brought \$30,000 at the sale. After payment of the note secured by this deed of trust and the expenses arising from the sale of the property, the substituted trustee deposited the remaining fund, \$16,430.02, with the Clerk of Superior Court of Catawba County in accordance with G.S. 45-21-31 (b).

This action was originally instituted by North Carolina National

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Bank, the holder of a promissory note secured by a second deed of trust on this property. North Carolina National Bank brought this action to have the court determine the correct disposition of the surplus monies deposited with the clerk. Because the surplus was insufficient to pay all of the judgment creditors and lienholders in full, it was necessary for the court to determine the order of priority among the lienholders claiming an interest in the surplus.

There were several judgment creditors and lienholders of record brought in as defendants who claimed an interest in the surplus. Most of these claims were based upon debts owed jointly by the husband and wife. However, one of defendants, the United States Department of Treasury (I.R.S.), claimed its share of the proceeds by virtue of its tax lien against Frank S. Cline, individually. This lien in the amount of \$12,883.85 was filed by the I.R.S. on 9 April 1976.

Judge Collier filed his initial judgment in this matter on 23 October 1979. He determined that the surplus proceeds from the foreclosure sale stood in the stead of the land, itself, in respect to the liens thereon. In other words, the surplus held by the clerk constructively retained the characteristics of the tenancy by the entirety. As a result of this disposition the I.R.S. received nothing despite the fact that its judgment was docketed prior to that of two other defendants, Northwestern Factors, Inc., and Conover Foam and Fiber Corporation, who both received a portion of their claims.

The I.R.S. appealed from this judgment. However, the court set aside its judgment of 23 October 1979 on motion of the I.R.S., because the I.R.S. had not received proper notice of the original hearing. Before the second hearing in this matter, the I.R.S. stipulated that it did not object to the disbursement of funds in accordance with the judgment entered 23 October 1979 insofar as it related to all other defendants with the exception of Northwestern Factors, Inc., and Conover Foam and Fiber Corporation.

The court entered its final judgment in this matter on 20 December 1979. The court held in accord with its initial judgment that the characteristics of the tenancy by the entirety were transferred from the real property to the surplus. It held that the claim of the I.R.S. was a lien only against property owned solely by Frank S. Cline, and it was not a lien against property held by the entirety. The I.R.S. had no lien against the land which was the subject of the foreclosure, by

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virtue of its being entirety property. Therefore, it had no lien against the surplus proceeds which would have any priority over the other creditors holding liens against the land which were transferred to the surplus. The I.R.S. received nothing on its claim.

On 3 January 1980, the I.R.S. mailed its notice of appeal from the judgment of 20 December 1979. This appeal was taken late because the I.R.S. did not receive notice of the entry of final judgment in this cause until 2 January 1980. On 6 February 1980, we allowed the petition for a writ of certiorari filed by the I.R.S.

M. Carr Ferguson, Assistant Attorney General, Gilbert E. Anderews, Daniel F. Ross, and Donald B. Susswein, For the Tax Division, Internal Revenue Service, for appellant United States of America.

E. James Moore for appellee Northwestern Factors, Inc.

MORRIS, Chief Judge

[1] The I.R.S. presents the novel question of whether funds generated by the foreclosure and sale of real property pursuant to a power of sale contained in a deed of trust conveying that property retain the characteristics of the underlying property and are thus constructively held by the entirety, or whether the tenancy by the entirety is terminated and the proceeds take on the characteristics of property held by tenants in common. The I.R.S. contends that when real property held by husband and wife as tenants by the entirety is foreclosed and sold pursuant to a power of sale in a deed of trust, the characteristics of the tenancy by the entirety come to an end, and the surplus funds resulting from the sale are held by the husband and wife as tenants in common. Under this theory the I.R.S. contends that through its tax lien against Frank S. Cline, individually, it would be entitled to one-half of the amount remaining of the surplus after payment of the other judgment creditors and lien-holders with chronological priority. This would give the I.R.S. a valid lien and place it before both Northwestern Factors, Inc., and Conover Foam and Fiber Corporation in the line for payment of debts secured by liens on the property.

The distinctive properties and incidents of an estate by the entirety are set forth by Justice Stacy in *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). See also: J. Webster, *Real Estate Law in North Carolina* § 102, § 114-117 (1971). The tenancy by the entirety had its origin in the common law fiction that the husband and wife repres-

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ented one entity. By virtue of the right of survivorship, which is the most distinguishing feature of this tenancy, the entire estate is vested in both the husband and wife simultaneously. Each spouse is deemed to be seized of the whole. The husband and wife are two natural persons, but they are treated by the law as one person. Upon the death of either spouse, the survivor automatically takes the entire estate. There is a change in the properties of the legal person holding the estate, but there is no alteration in the properties of the estate held.

It is basic law that neither the individual creditors of the husband nor the individual creditors of the wife can reach entirety property by execution upon a judgment procured against either spouse alone. However, joint creditors of both spouses can procure a judgment against both the husband and wife on a joint obligation, and the judgment will become a lien on land held by them as tenants by the entirety. This is why lenders and creditors so often compel husband and wife to execute obligations as co-makers. *Martin v. Lewis*, 187 N.C. 473, 122 S.E. 180 (1924); see: *Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835, (1967); *Edwards v. Arnold*, 250 N.C. 500, 109 S.E. 2d 205 (1959); J. Webster, *Real Estate Law in North Carolina* § 115 (1971).

North Carolina has adopted the tenancy by the entirety and all of the incidents and properties appurtenant thereto. The right of survivorship is the single most important characteristic of this manner of holding property. The I.R.S. is asking us in the case *sub judice* to abolish a significant part of the effectiveness of the right of survivorship as it relates to the tenancy by the entirety. This we are not willing to do.

Although North Carolina recognizes the right of husband and wife to hold real property as tenants by the entirety, it does not in general recognize the tenancy by the entirety in personal property. *Wilson v. Ervin*, 227 N.C. 396, 399, 42 S.E. 2d 468, 470 (1947), and cases cited therein. When husband and wife voluntarily sell and convey real property owned by them as tenants by the entirety, the proceeds of sale are considered personal property. Therefore, the husband and wife are tenants in common with respect to the ownership of the proceeds of the sale. *Shore v. Rabon*, 251 N.C. 790, 793, 112 S.E. 2d 556, 559 (1960), and cases cited therein; *Wilson v. Ervin*, *supra*. Generally, proceeds from a *voluntary* sale of real property held by the entirety are held by the husband and wife as tenants in common.

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The I.R.S. bases its argument upon this rule of law. They contend that a foreclosure sale, like that of the instant case, is a voluntary conversion of realty into personalty. Therefore, the proceeds should be held by tenancy in common. This would give them a right to participate in the disposition of the surplus. The I.R.S. contends that this foreclosure sale pursuant to a power of sale is voluntary because "the Clines jointly and voluntarily executed a deed of trust encumbering the property, and the Clines were in no way *legally* prevented from paying the debt secured by the deed of trust."

The above stated rule upon which the I.R.S. relies applies to *voluntary* but not *involuntary* conversions of real property held by the entirety. A different rule prevails in North Carolina when the transfer of property held by the entirety is involuntary. The cases hold that the funds received from the involuntary conversion of the underlying real property constructively retain the characteristics of property held by the entirety.

Highway Commission v. Myers, 270 N.C. 258, 154 S.E. 2d 87 (1967), involved an involuntary taking of real property held by the entirety. The North Carolina State Highway Commission, implementing the State's power of eminent domain, condemned a right of way for highway purposes over a portion of the real property owned by Irvin J. Myers and wife, Sarah V. Myers, as tenants by the entirety. Pursuant to this condemnation the Commission deposited with the Clerk of Superior Court \$10,455 as compensation for the land taken.

At the time of this condemnation Irvin J. Myers and his wife were separated, but not divorced. A dispute arose between the estranged couple over the proper disbursement of the proceeds from the condemnation. On appeal from an order of the Superior Court the State Supreme Court considered the question of whether Mrs. Myers was entitled to a distribution of any part of the \$10,455 deposit. In his opinion in which he found the deposit was held by the entirety, Justice Bobbitt stated:

Upon the filing of the complaint and the declaration of taking and deposit in court, the title and the right to immediate possession of the portion of the Myers property within the right of way of said project vested in the Commission. G.S. 136-104. Voluntary action by the owner is not involved. The question for decision is whether such involuntary transfer of title effected by the condemnation proceeding

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operates to destroy or dissolve the estate by the entirety as if the condemned portion of the Myers property had been sold and conveyed by the voluntary joint acts of the owners thereof. Specifically, is the compensation paid by the Commission for the appropriated property constructively real property, owned by husband and wife as tenants by the entirety, or personal property owned in equal shares by husband and wife?

Unless otherwise provided by their joint and voluntary agreement, and in the absence of an absolute divorce, we are of opinion and so decide that such involuntary transfer of title does not destroy or dissolve the estate by the entirety in respect of the appropriated portion of the Myers land, and that the compensation paid by the Commission therefore has the status of real property owned by husband and wife as tenants by the entirety.

270 N.C. at 262, 154 S.E. 2d at 90.

Similarly, in *Perry v. Jolly*, 259 N.C. 305, 130 S.E. 2d 654 (1963), the North Carolina Supreme Court declared that the proceeds from the sale of real property held by husband and wife constructively retained the characteristics of the real property where the wife was incompetent. The court reasoned that the wife's disability made the sale of the property involuntary. Therefore, the resulting proceeds were not held by the couple as tenants in common.

In *Perry*, the petitioner's wife, Florence Johnson Perry, had previously been adjudged incompetent. Her husband, the petitioner, instituted a special proceeding to have the court authorize the private sale of certain farm land owned by him and his wife as tenants by the entirety. Mrs. Perry's guardian objected to the sale. However, the sale was carried out and confirmed by the Superior Court. After the entry and approval of this confirmatory decree, W. H. Perry as attorney in fact for the petitioner appealed from the sale alleging among other things that the sale had destroyed the tenancy by the entirety. In answer to this issue the Supreme Court through Justice Higgins stated:

(2) The sale does not destroy or separate the interests of the tenants by the entirety if one of the parties is incompetent.

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The right of survivorship is transferred to the fund. A divorce will convert tenancy by entirety into a tenancy in common. A *voluntary* sale will work a conversion of the land into personalty to be held as other personalty. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468. However to be voluntary, the sale must be made by both husband and wife. Both must be *sui juris*. If one is incompetent, a sale cannot be the voluntary act of both. When the court finds it necessary for the good of the parties to require a sale, it is necessary that a good title pass to the purchaser. However, the right of survivorship is transferred to the fund to be held in the manner hereinafter discussed.

259 N.C. at 314, 130 S.E. 2d at 661. For cases from other jurisdictions holding that surplus money arising in foreclosure sale of entirety property is constructively entirety property, see 64 A.L.R. 2d 8, 60 (1959). See also *In re Castillian Apartments*, 281 N.C. 709, 190 S.E. 2d 161 (1972).

[2] The I.R.S. recognizes the import of our decisions with regard to involuntary conversions of entirety property. However, they contend that a foreclosure and sale pursuant to a power of sale in a deed of trust is voluntary. In support of their argument the I.R.S. cites two cases from sister jurisdictions, *Nat. Bank & Trust Co. of Norwich v. Richard*, 57 App. Div. 2d 156, 393 N.Y.S. 2d 801 (3d Dept. 1977), and *Fort Lee Savings & Loan Association v. Li Butti*, 55 N.J. 532, 264 A. 2d 33 (1970) *rev'g*. 106 N.J. Super. 211, 254 A. 2d 804 (App. Div. 1969), both of which hold that surplus money remaining after foreclosure of a mortgage on an estate held by the entirety becomes personal property held by the owners as tenants in common.

In *National Bank and Trust Company of Norwich*, *supra*, the New York Supreme Court relied on the prior case of *Hawthorne v. Hawthorne*, 13 N.Y. 2d 82, 242 N.Y.S. 2d 50, 192 N.E. 2d 20 (1963). *Hawthorne* held that proceeds from a contract of fire insurance covering entirety property, which were payable to husband and wife, were held by them as tenants in common rather than as tenants by the entirety. There is a vital distinction between the facts of *Hawthorne* and those of the present case.

Hawthorne dealt with the question of the proper distribution of fire insurance proceeds on a building which had been destroyed by

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fire. This building was situated on land held by husband and wife as tenants by the entirety. The underlying real property itself was never transferred, but remained in the ownership of the husband and wife. *Hawthorne* did not deal with the proper disposition of the surplus resulting from the foreclosure and sale of the underlying real property. The disputed funds resulted solely from the terms of an insurance contract.

A prior North Carolina case has limited the applicability of the *Hawthorne* reasoning to cases involving insurance proceeds on buildings when the land itself is never transferred.

In *Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968), a dispute arose between a separated husband and wife over the disbursement of fire insurance proceeds resulting from the destruction of a building situate upon land owned by them as tenants by the entirety. This Court held, as did the *Hawthorne* Court, that the fire insurance proceeds were not the product of an involuntary conversion. Therefore, they were held by the husband and wife as tenants in common. As in *Hawthorne*, there was no transfer of the underlying real property. In his opinion, Judge Parker was careful to distinguish this result from that which would occur if the disputed fund had arisen from the transfer of the real property rather than from the fire insurance proceeds. Judge Parker stated:

In the present case the insurance proceeds do not result from any transfer of title, voluntary or involuntary. The land is still owned by the husband and wife in exactly the same manner as before the fire. The disputed funds result solely from the terms of the contract of insurance. Under this contract the insurance company, in consideration of the premium paid to it, has assumed specified risks and has agreed to pay money to the parties insured upon the happening of certain events. Such a policy is a personal contract, appertaining to the parties to the contract and not to the thing which is subject to the risk insured against. 29 Am.Jur., Insurance, § 183, p. 575. Proceeds payable thereunder when an insured loss occurs take the place of the building destroyed only in the sense of being a thing of like value, not necessarily of like ownership.

Forsyth County v. Plemmons, supra, at 375, 164 S.E. 2d at 99.

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The distinction drawn by Judge Parker in *Plemmons* is clearly correct and valid. We cannot agree with the reasoning of the New York Supreme Court in *National Bank and Trust Company of Norwich* which applied the reasoning of *Hawthorne* with respect to fire insurance proceeds to the disposition of the surplus resulting from the foreclosure sale of real property.

Nor are we willing to follow *Fort Lee Savings & Loan Association v. Li Butti*, 55 N.J. 532, 264 A. 2d 33 (1970) *rev'g*. 106 N.J. Super. 211, 254 A. 2d 804 (App. Div. 1969), relied on by the I.R.S. There the Supreme Court of New Jersey reversed the judgment of the Appellate Division and held that a judgment creditor of a husband was entitled to payment of his judgment out of the surplus monies received upon the foreclosure sale of realty held by husband and wife by the entirety. In so doing the Court reversed a long line of New Jersey cases which had held that surplus funds resulting from a sale under a mortgage foreclosure of realty were deemed not to be converted into personality, but continued to maintain their classification as realty held by the entirety. *See Danes v. Smith*, 30 N.J. Super. 292, 104 A. 2d 455 (App. Div. 1954); *Vineland Savings & Loan Ass'n. v. Felmey*, 12 N.J. Super. 384, 79 A. 2d 714 (Ch. Div. 1950); *Morris v. Glaser*, 106 N.J. Eq. 585, 151 A. 766 (Ch. 1930); *Servis v. Dorn*, 76 N.J. Eq. 241, 76 A. 246 (Ch. 1909). The court's *per curiam* opinion in *Fort Lee Savings and Loan Ass'n. v. Li Butti*, 55 N.J. 532, 264 A. 2d 33 (1970), adopted for its reasoning the dissenting opinion of Judge Carton in *Fort Lee Savings and Loan Ass'n. v. Li Butti*, 106 N.J. Super. 214, 254 A. 2d 804 (App. Div. 1969). As in *National Bank and Trust Company of Norwich* the chief authority upon which Judge Carton rests his dissent is *Hawthorne*.

The I.R.S. argues that this foreclosure sale of real property was voluntary because it was pursuant to a power of sale provision which was voluntarily executed by the borrowers. The foreclosure and sale were steps in a process entirely consensual in origin and nature.

Theoretically, the I.R.S.'s argument may have some validity, but, practically, it cannot be said that the execution of a deed of trust with a power of sale provision and the subsequent implementation of that provision by the trustee are anything but involuntary. Typically, a deed of trust securing a note is a form deed which contains somewhere in the fine print the power of sale. Often the power of sale provision is not negotiable, but is a term which must be accepted by

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individual borrowers seeking a loan. The power of sale provision is placed in deeds of trust executed today, because it is so advantageous to the note holder. It allows the note holder to call upon the trustee to sell the property if default occurs without the necessity of a lawsuit which would be costly in terms of time and expense. The power of sale is simply a speedy and inexpensive way to obtain the equivalent results of a judicial foreclosure. Surely, it is unreasonable to say that borrowers have a choice between executing a deed of trust with a power of sale provision or one without. It is even more unreasonable to say, as does the I.R.S., that the borrowers' failure to keep up their payments resulting in default and foreclosure is voluntary. The borrowers' default on their note and the subsequent foreclosure and sale of the realty securing the note are obviously involuntary.

[3] Finally, the I.R.S. argues that the actual wording of the power of sale provision contained in the deed of trust in the present case proves that the parties intended that the surplus proceeds on the occasion of foreclosure were to be held by them as tenants in common. The critical language provides that the surplus proceeds from a foreclosure sale could be paid, "to the Grantors, *or either of them*, or to their legal representatives." (Emphasis added.)

The quoted phrase is mere boiler-plate found in the usual form deed of trust. This particular language would have appeared unchanged in the form deed of trust no matter the capacity in which the grantors held the subject property. The language is deliberately worded in the alternative so that it can apply no matter whether the grantors hold the property as tenants in common, tenants by the entirety, or joint tenants.

Further, this language hardly fits the characteristics of the tenancy in common. "In a tenancy in common the tenants 'hold by several and distinct titles but by unity of possession.' That is to say, each tenant in common owns a separate undivided interest in the land in his own right and each has an equal right to possession. Unity of possession is the only requisite unity - the tenants own distinct moieties in the land." J. Webster, *Real Estate Law in North Carolina* § 101 (1971). The language contained in this deed of trust, which is emphasized by the I.R.S., "*or either of them*", is inconsistent with this definition of a tenancy in common. The quoted language uses the word "either" which can be interpreted to mean that one or the other of the

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grantors could be given the entire surplus of a foreclosure sale. A tenancy in common would require that each tenant be entitled only to the share of the surplus proceeds which was proportional to his share of ownership in the real property. Under this quoted language either tenant could receive the whole surplus. Therefore, this language does not indicate that the grantors only intended that any surplus be held by them in common.

North Carolina has adopted the tenancy by the entirety as one method by which husband and wife may hold real property. The tenancy takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to the two persons was regarded in law as a conveyance to one person.

The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. *Long v. Barnes*, 87 N.C., 329; *Bertles v. Nunan*, 92 N.Y., 152. These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina. *Freeman v. Belfer*, 173 N.C., 587. It still possesses here the same properties and incidents as at common law. *Bynum v. Wicker*, 141 N.C., 95. The act abolishing survivorship in joint tenancies in fee (C.S., 1735) does not apply to tenancies by the entirety. *Motley v. Whitmore*, 19 N.C., 537. A joint tenancy is distinguished by the four unities of time, title, interest, and possession (*Moore v. Trust Co.*, 178 N.C., p. 124); and it has been held that in tenancies by the entirety, a fifth unity is added to the four common-law unities recognized in joint tenancies, to wit, unity of person. *Topping v. Sadler*, 50 N.C., 357.

Davis v. Bass, 188 N.C. 200, 203, 124 S.E. 564, 567-68 (1924).

The right of survivorship, one of the most important incidents of the death obtains because the whole estate belongs to the survivor by right of purchase under the original grant, because each tenant was

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seized of the whole from the beginning, and the tenant who died owned no estate which was descendible or divisible. Neither tenant can sever the union of interest so as to destroy the right of survivorship without the consent of the other. To hold as the I.R.S. contends would effectively destroy the right of survivorship without the consent of either party. This we are not willing to do. We, therefore, hold that the surplus remaining after the foreclosure and sale pursuant to a power of sale in a deed of trust of real property held by husband and wife as tenants by the entirety constructively retains the characteristics of the real property and is held by or for the benefit of the husband and wife as tenants by the entirety.

Affirmed.

Judge WELLS concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

The issue is whether surplus proceeds from the foreclosure sale of realty held as tenants by the entirety may be constructively deemed to be entirety property even though such proceeds are personality. The majority holds that such proceeds take on an entirety character because they are created by an involuntary conversion of realty held by the entirety. The result is that an individual judgment creditor of the husband may not enforce its claim against the proceeds since entirety property is only subject to claims upon a joint obligation of the husband and wife. I respectfully urge that a contrary conclusion and result are dictated by an analysis of the common law features of a tenancy by the entirety, the nature of the conversion occurring at a foreclosure sale due to a default on a joint obligation, and the relevant case law of this State.

North Carolina is a "strong" tenancy by the entirety state. 47 N.C. L. Rev. 963 (1969). Our courts have long held that the estate exists as it did at common law and that it has not been changed by any statute or constitutional provision (married women property acts). *Bank v. Hall*, 201 N.C. 787, 161 S.E. 484 (1931); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Dorsey v. Kirkland*, 177 N.C. 520, 99 S.E. 407 (1919); *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906). The most distinctive characteristic of the tenancy by the entirety is the requirement that the property so held must be realty in which the unities of time, title, interest, possession and person (husband and wife) simultaneously exist for the duration of the estate. See Webster, *Real Estate*

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Law in North Carolina § 102 (1971); 4A Powell, *The Law of Real Property* 620 (1979); 4 Thompson, *The Modern Law of Real Property* § 1784 (Grimes ed. 1979). Thus, the rule is that when a husband and wife jointly sell entirety property, the cash proceeds thereof are held by them as tenants in common. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468 (1947). Such a conclusion is necessarily compelled at common law since a sale destroys the unities of title and possession, and the property taken in exchange (the cash) is personalty.

A decision imprinting these surplus proceeds with an entirety character is, therefore, inconsistent with basic common law in two major respects. First, the foreclosure sale is still a sale, and as such, it destroys the unities of title and possession required for the existence of a tenancy by the entirety. The land foreclosed upon now belongs to another, and the Clines have no claim whatsoever to it. Second, the surplus proceeds produced by the foreclosure sale are obviously personalty, not realty, and the common law did not recognize a tenancy by the entirety in personalty. *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923); *Moore v. Trust Co.*, 178 N.C. 118, 100 S.E. 269 (1919) (concurring opinion, Clark, C.J.).

The majority, nevertheless, concludes that a foreclosure sale is an involuntary conversion of entirety realty into personalty. The involuntary conversion theory creates an exception to the general rule that there can be no tenancies by the entirety in personalty. This exception, however, has only been recognized in two situations: *Highway Commission v. Myers*, 270 N.C. 258, 154 S.E. 2d 87 (1967) (proceeds awarded for condemnation of entirety realty are held by the entirety); and *Perry v. Jolly*, 259 N.C. 305, 130 S.E. 2d 654 (1963) (proceeds from the sale of entirety realty are held by the entirety when the wife is incompetent) [*accord*, In re Estate of Fox, 67 Misc. 2d 470, 324 N.Y.S. 2d 434 (Surr. Ct. 1971)].

Both *Perry* and *Myers* are inapposite here. In *Perry*, *supra*, the wife was unable to do a voluntary legal act, that of joining in the sale of the entirety property, because of her incompetence. Therefore, any sale of the property, was necessarily involuntary as to her which certainly justified the protective retention of the tenancy by the entirety as to the proceeds. In *Myers*, *supra*, the sole cause of the conversion of the realty into personalty was an official act of the state pursuant to its eminent domain powers. The husband and wife simply

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did not do anything. Since the act of condemnation did not involve any voluntary action by the owners, the Court held that the "involuntary appropriation [by the Commission] does not destroy the tenancy by the entirety, but merely transfers the rights of the tenants from the land to the funds." 270 N.C. at 263, 154 S.E. 2d at 90. In this case, however, the Clines contributed to the event of a foreclosure sale by their joint execution of the deed of trust and their failure to make payments upon that joint obligation. Moreover, the involuntary conversion exception does not apply to every situation where the triggering event of the conversion is arguably involuntary. See *Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968) (discussed *infra*).

An instructive analogy here is to cases involving the award of fire insurance proceeds for the loss of entirety realty. In *Hawthorne v. Hawthorne*, the New York Court of Appeals refused to apply the involuntary conversion exception to fire insurance proceeds of entirety realty and stated:

If the insurance proceeds are the logical substitute of anything they are the fruit of the insurance contract and the premiums paid under it. In sum, while the loss was involuntary, the draft is not a substitute forced on the parties equally involuntarily [as in the condemnation cases]; it is the product of their voluntary contractual act and is held by them in the same way as any personal property voluntarily acquired.

13 N.Y. 2d 82, 85, 242 N.Y.S. 2d 50, 52 (1963). The rule in *Hawthorne*, that the involuntary loss must be the source of the funds received, severely restricts the involuntary conversion exception, and it is doubtful that the theory has any application beyond eminent domain proceedings. 28 Albany L. Rev. 319 (1964); 49 Cornell L.Q. 559 (1964).

This Court adopted the reasoning of *Hawthorne, supra*, in *Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968). Both *Hawthorne* and *Plemmons* hold that fire insurance proceeds from entirety realty are held by the husband and wife as tenants in common. In addition, the Courts, in both cases, gave much weight to the prohibition against tenancy by the entirety in personalty and expressly found that the condemnation cases were not controlling.

It is not unusual for the permanent improvements on real estate

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to exceed the value of the underlying land many times over. In every case, the improvements represent a part of the total value of the realty or they would not be insured. A fire, therefore, converts a substantial part of the value of the realty into personalty in the form of insurance proceeds. The conversion by fire is an involuntary event as far as the owners are concerned. It would seem that a much more persuasive argument could be made for the proposition that, where the value of realty is converted into personalty by fire, the insurance proceeds should take on the attributes of that which they replace, rather than here where the conversion to personalty is triggered by the voluntary execution of a conveyance in trust. I do not believe, therefore, that *Plemmons, supra*, limited the applicability of the reasoning in *Hawthorne v. Hawthorne*, 13 N.Y. 2d 82, 242 N.Y.S. 2d 50 (1963), to those cases involving fire insurance proceeds for a building where title to the unimpaired realty, the bare land, is not transferred.

I also fail to see how the events leading up to a foreclosure can be characterized as involuntary. The parties make several critical choices: among them, whether to own real estate, what kind of estate will be used to hold the title, whether to encumber their title and the nature of that encumbrance. Admittedly, it is unusual for prospective purchasers to obtain much real property without some form of installment financing. It is equally true that financial circumstances may make it prudent to raise money on the security of real estate. These facts, however, do not mean that the conveyance of entirety property to a trustee pursuant to a deed of trust is anything other than a voluntary act even though the execution of the conveyance and subsequent default may be affected by a number of economic factors beyond the control of the parties.

Unlike the majority of jurisdictions which consider a mortgage to be a lien, in this State, the execution of a mortgage, or a deed of trust, constitutes a conveyance of legal title, in the nature of a determinable fee, to the mortgagee or trustee. *Gregg v. Williamson*, 246 N.C. 356, 98 S.E. 2d 481 (1957); *Simms v. Hawkins*, 1 N.C. App. 168, 160 S.E. 2d 514 (1968). Our State is, therefore, a member of a small minority adhering to a "title" or "conveyance" theory of mortgages in which the mortgagor retains only an equity of redemption, the right to have legal title restored upon satisfaction of the underlying debt. Webster, *Real Estate Law in North Carolina* §§ 228-229 (1971); Smith and Boyer, *Survey of the Law of Property* 338 (2d ed. 1971); Reeves, *Special Subjects of the Law of Real Property* §§ 459-460, at 627-28 (1904). The grantors

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here merely retained the right to redeem the property from the trustee's legal title by paying the debt, a right they did not exercise.

There is substantial authority in North Carolina indicating that these surplus proceeds are not held by the entirety. In *Bruce v. Nicholson*, 109 N.C. 202, 13 S.E. 790 (1891), the plaintiff brought an action to foreclose upon two mortgages on entirety property executed by the husband and wife. An individual creditor of the husband moved to be made a party defendant in the foreclosure action to protect its judgment lien. The motion was denied because the creditor had no interest in the *land* to be foreclosed upon since it was held by the entirety. On appeal, the Supreme Court affirmed the denial of the motion because the appellants

did *not* ask to be made a party defendant in the action *for the purpose of enforcing their supposed lien and sharing in the funds, the proceeds of the sale of the land according to their alleged right*, but for the purpose of alleging collusion between the plaintiffs and defendants to the prejudice of themselves and other creditors, and to contest the validity of the plaintiff's mortgages and debts secured by them.

109 N.C. at 206-07, 13 S.E. at 791 (emphasis added). The Court held that the creditor could not allege collusion between the parties as a defense to the foreclosure action; rather, the proper remedy was to bring an independent action on this basis. Nevertheless, it is clear that the Court assumed that the proceeds from a foreclosure sale were personally held in common and that the husband's share thereof would be subject to the liens of his creditors in a proper proceeding.

In addition, the cases of *Porter v. Bank*, 249 N.C. 173, 105 S.E. 2d 669 (1958), and 251 N.C. 573, 111 S.E. 2d 904 (1960), cannot be ignored in the determination of the issue presented here. In the second *Porter* case (1960), the Court held that an order for alimony pendente lite in favor of the wife could not create a lien in *futuro* on the husband's share of surplus proceeds to be derived from a foreclosure sale under a deed of trust on real property owned by the couple by the entirety. Thus, the wife's claims against her husband did not have priority over an individual creditor's lien which had attached to the husband's interest in the surplus after the foreclosure sale when the trustee deposited it with the clerk. 251 N.C. at 580-81, 111 S.E. 2d at 910. In both the first and the second *Porter* cases, the Supreme Court obvious-

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ly believed that the surplus proceeds from the foreclosure were held by the husband and wife as tenants in common and that the share of each was subject to the duly attached liens of their individual creditors.

Another pertinent case is *Koob v. Koob*, 283 N.C. 129, 195 S.E. 2d 552 (1973). *Koob* involved a dispute over the distribution of surplus proceeds from a foreclosure of entirety property between the husband and wife in the wife's action for alimony without divorce. Chief Justice Bobbitt recognized the holding in *Porter v. Bank*, 251 N.C. 573, 111 S.E. 2d 904 (1960): "that a creditor of defendant-husband who had levied on the husband's interest in the surplus had priority over the wife's claim under the order providing for the payment of alimony to her." 283 N.C. at 139, 195 S.E. 2d at 559. Although he did not appraise "the legal significance" of the difference in the facts in *Koob* and those in *Porter*, the Chief Justice, nonetheless, pointed out the following:

In *Porter v. Bank*, the surplus fund of \$9,382.34 was the result of the foreclosure by Frank Banzet, Trustee, of a deed of trust which had been executed by the defendant-husband and the plaintiff-wife. In the present case, the surplus fund of \$25,853.23 resulted from the foreclosure by Douglas, Trustee, of a deed of trust which had been executed by Harry J. Hill and wife, Mary H. Hill, prior owners of the subject realty, and not by William M. Koob and wife, Marilyn S. Koob.

Id. The Court thus seems to assume that, had the deed of trust foreclosed upon been executed by the Koobs, the holding in *Porter v. Bank*, 251 N.C. 573, 111 S.E. 2d 904 (1960) would clearly control.

Apparently, one noted author has misconstrued the *Koob* case and cited it for the proposition that a foreclosure of a deed of trust is an involuntary transfer of title which causes the proceeds to retain their entirety status. See 2 Lee, *North Carolina Family Law* § 114, at 49 (4th ed. 1980). *Koob* does not so hold. See *Crumpton v. Crumpton*, 290 N.C. 651, 657-58, 227 S.E. 2d 587, 592 (1976). Indeed, the Court avoided the "critical question" of whether the trustee's foreclosure constituted a dissolution of the estate by the entirety by the voluntary joint acts of the husband and wife. Instead, the Court vacated the orders purporting to adjudge the respective rights to the surplus because the process served on the husband had been insufficient to confer jurisdiction for such adjudication. 283 N.C. at 142, 195 S.E. 2d at 561.

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Two other jurisdictions have spurned the involuntary conversion theory as a means of avoiding the common law rule prohibiting tenancies by the entirety in personalty where surplus proceeds from a foreclosure sale upon a voluntarily executed mortgage are involved. New York and New Jersey have specifically held that such proceeds, identical to those in this case, are held in common, not by the entirety. The leading case is *Franklin Square Nat. Bank v. Schiller*, 202 Misc. 576, 119 N.Y.S. 2d 291 (Sup. Ct. 1950). *Schiller* was the first case to hold that foreclosure proceeds were held by the owners as tenants in common, and it was expressly approved as the controlling law in *Hawthorne v. Hawthorne*, 13 N.Y. 2d 82, 86, 242 N.Y.S. 2d 50, 53 (1963) [adopted by this court in *Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968)]. Two cases following the *Schiller* result are *Nat. Bank & Trust v. Rickard*, 57 App. Div. 2d 156, 393 N.Y.S. 2d 801 (3d Dept. 1977) and *Fort Lee Savings & Loan Association v. LiButti*, 106 N.J. Super. 211, 254 A. 2d 804 (App. Div. 1969), *rev'd per curiam*, 55 N.J. 532, 264 A. 2d 33 (1970). In *Rickard*, the Court explained the result by stating: "Here the giving of the mortgage, the vehicle which authorized the sale, was a voluntary act of the husband and wife and the authorized sale merely an incident in producing the fund." 57 App. Div. 2d at 158, 393 N.Y.S. 2d at 802. *Accord*, *Mojeski v. Siegmann*, 87 Misc. 2d 690, 386 N.Y.S. 2d 609 (Sup. Ct. 1976), *aff'd*, 57 App. Div. 2d 549, 392 N.Y.S. 2d 1021 (3d Dept. 1977). In its reversal of *Fort Lee Savings and Loan*, the New Jersey Supreme Court adopted the reasoned dissent of Judge Carton (from the lower court). 55 N.J. at 533, 264 A. 2d at 33. Judge Carton concluded that the involuntary conversion theory could not be used to impress the foreclosure proceeds with a tenancy by the entirety because

It establishes an exception to the salutary rule that tenancies by the entirety may not exist in personal property and by means of a fiction extends in a new form a type of tenancy whose values has [*sic*] been widely questioned even so far as it applies to real property.

. . .

Mortgagors, in executing mortgages, must certainly be held to have understood both that they must pay the amount which the mortgage secures and that their interest in the property may be cut off by foreclosure and sale of the property in the event of a default. The foreclosure and sale

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are steps in a process entirely consensual in its origin and nature.

106 N.J. Super. at 214, 217, 254 A. 2d at 806, 807-08. See *Pulawski Savings & Loan Association v. Aguiar*, 174 N.J. Super. 42, 415 A. 2d 365 (1980). *Rickard and Fort Lee Savings and Loan* clearly incorporate the holding of *Hawthorne v. Hawthorne*, 13 N.Y. 2d 82, 242 N.Y.S. 2d 50 (1963), limiting the application of the involuntary conversion theory.

It is significant that New York, New Jersey and North Carolina adhere to the minority position, among entirety jurisdictions, that there can be no such tenancy in personalty. Moynihan, *Introduction to the Law of Real Property* 231 (1962). Authority from other jurisdictions, which recognize tenancy by the entirety in personalty, that foreclosure proceeds are constructive entirety property, should be disregarded for purposes of determining the issue in this State. See *Annot.*, 64 A.L.R. 2d 8, 60 (1959). In sum, the reasoned (and applicable) authority of North Carolina and other comparable jurisdictions seems to compel the conclusion that the surplus proceeds, received by the husband and wife from a foreclosure sale upon a jointly executed deed of trust for entirety realty, are personalty held in common subject to the legitimate claims of creditors against the individual tenants.

This Court should, of course, continue to protect and enforce the right of survivorship to entirety property. This incident of the tenancy does not, however, deserve such attention here where the parties jointly executed a deed of trust. The husband and wife were both responsible for making the payments. See *Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238, *cert. denied*, 287 N.C. 264, 214 S.E. 2d 437 (1975). When they conveyed title to the trustee, the Clines were aware of the consequences that could follow from their failure to comply with the trust and redeem the title to the property.

Sound public policy would seem to favor a decision that would subject the husband's share of the surplus to the duly attached liens of his individual creditors. The tenancy by the entirety has been uniformly criticized on the basis of its use as a mechanism to avoid the claims of creditors. See Grilliot and Yocum, *Tenancy by the Entirety: An Ancient Fiction Frustrates Modern Creditors*, 17 Am. Bus. L.J. 341 (1979); 4A Powell, *The Law of Real Property* ¶ 623 (1979); Moynihan, *Introduction to the Law of Real Property* 234-35 (1962). Our own courts have criticized the tenancy often and have suggested that it be abol-

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ished more than once. *Moore v. Trust Co.*, 178 N.C. 118, 100 S.E. 269 (1919) (concurring opinion, Clark, C.J.); *Dorsey v. Kirkland*, 177 N.C. 520, 99 S.E. 407 (1919); *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906). It is, therefore, inappropriate to extend the estate by the entirety "at this late day" to personalty when it exists solely by virtue of common law which inflexibly recognized it only in realty. *Gooch v. Bank*, 176 N.C. 213, 97 S.E. 53 (1918).

In conclusion, I am not inadvertent to the further question concerning the distribution of these surplus proceeds among the joint creditors of the Clines and Mr. Cline's individual creditors. See *Johnson v. Leavitt*, 188 N.C. 682, 686, 125 S.E. 490, 497 (1924). The majority opinion, however, makes consideration of this issue unnecessary.

HARRY L. COOK, PLAINTIFF v. EXPORT LEAF TOBACCO COMPANY, DEFENDANT
AND THIRD PARTY PLAINTIFF v. JOHN L. COOK, D/B/A JOHN L. COOK PLUMBING
COMPANY, THIRD PARTY DEFENDANT

No. 807SC429

(Filed 16 December 1980)

**Master and Servant § 19— injury to employee of independent contractor
—defective wheels on portable elevator — sufficiency of evidence of negligence and contributory negligence**

In an action to recover for personal injuries sustained by plaintiff on defendant's premises while in the scope of his employment, evidence was sufficient to be submitted to the jury where it tended to show that plaintiff worked for his father who was an independent contractor who had performed maintenance work for defendant for several years; defendant was obligated to furnish equipment under its maintenance contract with plaintiff's father; one of defendant's employees was specifically responsible for maintaining and replacing the tools; the portable elevator on which plaintiff was working at the time of his injuries was not a simple tool but was a complex instrument capable of moving an adult 25 feet into the air; plaintiff's father set the spring loaded lock on the wheels at the front of the elevator, and the wheels were set in a fixed direction parallel to the edge of the loading platform where the repairs were to be made; plaintiff then applied the brakes to the rear wheels and shook the elevator to determine that the brakes and locks were holding; as plaintiff was completing the repairs, he heard metal to metal clinking sounds, and the elevator began to roll off the platform; defendant had earlier been informed that the wheels on the elevator needed replacing; and defendant's employee who was responsible for the equipment told plaintiff that the elevator had been repaired, and it appeared to plaintiff, upon inspection, that some repair work had been done. Moreover, evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law in not discovering the defects in the brakes, in engaging the brakes by pressing down instead of up on a lever, in placing

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the scaffold at the edge of the loading dock, in failing to insure that his helper remained close at hand, in using the elevator when he knew the brakes needed replacing, or in failing to use outriggers to stabilize the elevator.

APPEAL by plaintiff from *Reid, Judge*, Judgment entered 6 December 1979 in Superior Court, WILSON County. Heard in the Court of Appeals 17 October 1980.

This is an action brought by plaintiff under the provisions of G.S. 97-10.2 against defendant for personal injuries sustained by plaintiff on defendant's premises while in the scope of his employment with the third party defendant, plaintiff's father. Defendant filed answer denying negligence, asserting contributory negligence, and impleading plaintiff's employer for indemnification. Thereafter, defendant filed an amended answer based upon the alleged joint negligence of the third party defendant.

On 14 August 1979, defendant filed a motion for summary judgment on its third party claim seeking judgment that the contract between the parties requires indemnification for any recovery by plaintiff. The trial court granted summary judgment for defendant, and third party defendant appealed to the Court of Appeals. On 3 June 1980 this Court dismissed the appeal as interlocutory.

At trial of the case on its merits, the trial judge granted defendant's motion for a directed verdict. The court held plaintiff's evidence was insufficient as a matter of law to establish defendant's negligence proximately causing plaintiff's injuries and that plaintiff was contributorily negligent. Plaintiff appeals. The controlling facts are discussed in the opinion.

Connor, Lee, Connor, Reece & Bunn, by James F. Rogerson and Cyrus F. Lee, for plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and Daniel R. Taylor Jr., for defendant appellee.

HILL, Judge.

Plaintiff assigns as error the trial judge's action allowing defendant's motion for a directed verdict.

When a motion for a directed verdict is made under Rule 50, the trial judge must determine whether the evidence taken in the light most favorable to the plaintiff and giving him the benefit of every

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reasonable inference which can be drawn therefrom, was sufficient to withstand defendant's motion for a directed verdict. In ruling on a motion for a directed verdict, the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made. See Shuford, N. C. Civil Practice and Procedure, § 50-5, p. 410 (1975), and cases cited therein. The foregoing rules are elementary, but must be kept in perspective in analyzing the evidence before us.

Justice Higgins, speaking for the Court, in *Burr v. Everhart*, 246 N. C. 327, 329, 98 S. E. 2d 327 (1957), set out the essential elements a plaintiff must show in order to make out a case of actionable negligence. The plaintiff must show

(1) the defendant has failed to exercise proper care in the performance of a duty owed to the plaintiff; (2) that the negligent breach of that duty was the proximate cause of the plaintiff's injury; (3) that a person of ordinary prudence should have foreseen such result was probable under the conditions as they existed. (Citations omitted.)

The evidence in the record is extensive and meets the requirements of *Burr, supra*. John L. Cook (John) is an independent contractor who for several years has performed maintenance work for Export Leaf Tobacco Company (Export). Export furnished any tools and equipment John needed while working on Export's premises. John's son, Harry L. Cook (Harry), was John's employee and was injured during his employment when a portable elevator upon which Harry was standing, and which was furnished by Export, rolled off a loading dock and fell into the parking area below. The plaintiff, Harry, has been compensated for his injuries under the Worker's Compensation Act.

On 29 October 1976, Export's maintenance foreman, Wesley Napier, instructed John and Harry to go to the loading platform at the plant and repair two air hoists. Export wanted the repair to be made immediately. The floor of the platform was twelve feet wide and five feet above the asphalt parking lot, and sloped slightly toward the lot. The air hoists and motors were 18 inches apart, on I beams located approximately 25 feet above the platform, and were operated from control boxes affixed to rubber hoses which hung to within four or five feet of the floor.

Export furnished John with a portable electric elevator when

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work was to be done in the ceiling area. During the year prior to the accident, John was required to use a particular elevator--one assigned to Wesley Napier. The elevator platform extends twenty to twenty-five feet in the air by scissor-like action and is mounted on a steel base located about one foot above the floor. There are four metal wheels under the base of the elevator which can swivel 360 degrees. The elevator weighs approximately 1700 pounds. The wheels are eight inches in diameter, two inches in width, and mounted on a one-half inch axle which was supported by a caster on a swivel.

The two front wheels had spring loaded locks designed to be secured manually in a fixed direction when necessary. The spring loaded locks used a plunger to fit into four notches which were 90 degrees apart on the caster of the wheel. The locks were applied by manually releasing the plunger in one of the four notches. The two front wheels were then set in a fixed direction and were designed not to swivel, though they could still roll on the floor in a fixed direction.

The two rear wheels were equipped with a brake of cam and lever design. By raising the lever up and away from the floor, the cam which was attached to the lever would press a metal plate up against the treads of the wheel, preventing the rear wheels from both swiveling and rolling.

The elevator was also equipped with four outriggers designed to be used on each side of the elevator for additional supports.

Plaintiff's evidence tends to show that John and he rolled the elevator from inside the building into position on the loading platform, proceeded to repair the first hoist, lowered the elevator, and moved the elevator eighteen inches into position to repair the second hoist. Because the conveyor was protruding onto the loading platform, it was necessary to set the elevator about one foot from the edge of the platform, thus preventing use of the outriggers. The conveyor could have been moved but would not run all the way back into the building. John testified that he set the spring loaded lock on the wheels at the front of the elevator, which were set in a fixed direction parallel to the edge of the loading platform. Harry then applied the brakes to the rear wheels and shook the elevator to determine that the brakes and locks were holding.

Harry testified that he then raised the platform on the elevator approximately twenty feet in the air. As he was completing the repair

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of the second hoist, Harry heard a metal to metal clinking sound to his right, and in a second or two, heard a metal to metal clinking sound to his left. The elevator began to roll off the platform. Harry grabbed the I beam and attempted to hold the elevator, but was unable to do so. The elevator rolled off the loading dock, tipped, causing Harry to fall onto the parking lot and suffer serious injury.

The evidence tends to show that prior to the accident John Cook walked four or five feet from the elevator to determine if the Export foreman had any additional work to be done. The foreman noticed the scaffold rolling. John ran for the scaffold, but could not stop it. He noticed the spring lock wheels on the front of the scaffold were running perpendicular to the front edge of the platform and the rear wheels were no longer in a parallel position with the edge of the dock.

John testified that he had heard the metal to metal clinking noise from the scaffold before--two or three weeks prior to the accident. The spring loaded locks and the brakes had disengaged, and the elevator had moved.

There is evidence that Export had been advised the elevator needed new wheels and that plaintiff had been told the wheels were back ordered. Two or three days prior to the accident, Harry was assigned to repair a roof drain. When he started rolling the scaffold elevator out of the workshop, the wheels began wobbling. The two front locks swung around and ran into Harry and Charles Butler, an Export employee. The scaffold locked in a sideways position. Harry reported the problem with the elevator to Napier and refused to use it. Napier instructed Harry and his helpers to work on another job and stated he would repair the scaffold. After lunch, Napier told Harry he had fixed the scaffold; that he had repaired the wheels. Harry noticed the wheels looked cleaner and that grease was coming out of the grease fitting. Harry used the elevator that day, but did not use it again until the date of the accident.

Export contends plaintiff has failed to show any evidence beyond conjecture or speculation as to the cause of his injury or breach of any legal duty by Export. Export also alleges contributory negligence as a defense. Export contends that its duty to Harry, at the very most, was to exercise due care to inspect, at reasonable intervals, the tools, appliances, and equipment furnished. *Petty v. Print Works*, 243 N. C. 292, 90 S.E. 2d 717 (1956).

Export was obligated to furnish equipment under its mainte-

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nance contract with John. Wesley Napier was responsible for maintaining and replacing the tools. This obligation was not a simple bailment where tools and equipment were furnished for convenience. The elevator furnished by Export was not a simple tool such as a hammer, axe, chisel, etc., where inspection by the user would readily reveal a defect. Rather, it was a complex instrument capable of moving an adult 25 feet into the air.

Justice Bobbitt (later Chief Justice), in *Petty, supra*, at pp. 300, 301, states that,

'A contractee who agreed to provide a contractor with a particular instrumentality for the purpose of the stipulated work is ordinarily liable for any injury which a servant of the contractor may sustain during the progress of the work, by reason of a defect which was known to the principal employer, or which he might have discovered by the exercise of reasonable care, at the time when the instrumentality was turned over to the contractor.'" (Citation omitted.)

We find that plaintiff submitted enough evidence of Export's notice of the alleged defects in the elevator and enough evidence of improper repairs to withstand a motion for directed verdict.

Export argues that Harry was contributorily negligent as a matter of law and argues several bases for its position. We discuss them *in seriatim*.

Export contends that any defect in the brakes ought to have been discovered by plaintiff. The elevator consisted of wheels, a base platform and extension apparatus, together with a cage. It weighed 1700 pounds. When plaintiff was advised that the elevator had been repaired by Export's foreman, he looked at the wheels and saw that work had been done. Harry was under no duty to make a more detailed examination. This is especially true given the evidence that Export was pressing John Cook to get the hoists repaired so that the day's tobacco shipments could be received.

Export further argues that Harry was contributorily negligent as a matter of law, pointing to his testimony that the brakes were engaged by pushing *down* on a lever. Export points to the exhibit and demonstrates that pressing *down* on the lever *disengages* the brake shoe.

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During oral argument before this Court, the exhibit was placed in an upside down position. In that position downward pressure toward the floor would have engaged the shoe. We do not know in what position the exhibit may have been in the trial court.

To explain his action, Harry testified without objection that before ascending to the second beam he engaged the foot brakes again and his father engaged the spring loaded locks. Harry testified that his father told him he had engaged the locks. Harry further stated that he "shook the scaffolding and made sure that it was secure before [he] went up on it, and the brakes held, and the locks held on the front end." This testimony sufficiently contradicts Export's argument that Harry could not have engaged the brakes by pushing down so as to require the jury to pass on the question.

Export further demonstrated at trial and in oral argument that any noise from the device locking the wheels in position comes only when the expanding spring causes the plunger to engage; never when it disengages. Yet, Harry testified that he heard a metal to metal clinking sound right before the brakes disengaged. Export argues that the testimony, being contrary to the laws of science and nature, is not legally sufficient evidence to be passed on by a jury. *Burgess v. Mattox*, 260 N. C. 305, 132 S. E. 2d 577 (1963); *Jones v. Schaffer*, 252 N. C. 368, 114 S. E. 2d 105 (1960).

Harry testified that he heard a clinking sound, first to his right and then to his left; that he recognized the sounds as coming from the wheels; and that the sound was of locks disengaging. Harry's testimony is contrary to Export's demonstration, but in no way does Export's demonstration reflect an irrefutable law of nature. The demonstration was conducted under controlled circumstances. We do not know what pressure is generated on a lock through leverage by an adult standing on a platform 20 or more feet above an 8-inch wheel. We must conclude it to be a possibility for consideration by a jury that metal touched metal and created sound, and that such sound could have been caused by a release of the brakes and disengaging of the plungers.

Export next argues that Harry was contributorily negligent as a matter of law because he placed the scaffold at the edge of the loading dock. Export contends Harry's failure to insure that his helper remained close at hand was negligence and that Harry's contributory negligence became more flagrant considering that Harry knew the

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brakes needed to be replaced. We do not agree. The evidence shows that the hoists could not be run all the way back into the warehouse. The jury must decide whether Harry was contributorily negligent in placing the scaffold where he did.

We cannot agree that Harry was contributorily negligent as a matter of law in failing to insure that John remained close by. Plaintiff was working 20 feet in the air on a problem which required that he direct his attention upward. Harry had no reason to anticipate John's departure.

Nor can we agree that Harry was contributorily negligent as a matter of law because he knew the brakes needed replacing. Harry had been advised that the elevator had been repaired. He saw his father engage the directional plunger on the front wheels. Harry personally affixed the brakes and then shook the elevator to determine that it was in place and holding.

Defendant had instructed Harry to make immediate repairs on the hoist, so that tobacco could be unloaded on the dock. Unless a condition is so obviously dangerous that a man of ordinary prudence would not have run the risk under the circumstances, conduct which otherwise might be pronounced contributory negligence as a matter of law is deprived of its character as such if done at the direction or order of defendant. *Swaney v. Steel Co.*, 259 N.C. 531, 543, 131 S.E. 2d 601 (1963).

Export contends failure to use outriggers to stabilize the elevator constituted contributory negligence as a matter of law. We do not agree. Harry contends the outriggers could not be used so near the edge of the dock. The issue of Harry's contributory negligence is one to be considered by the jury. The evidence of plaintiff's contributory negligence as a matter of law was not sufficient to form the basis for a directed verdict against him.

Next, we must decide whether it was competent for plaintiff to testify that the locks in the elevator he was using had released, based upon the sounds he heard. Plaintiff was not allowed to testify that the noise he heard just prior to the scaffold rolling off the platform was the spring locks disengaging. The trial judge ruled that Harry had no basis for a conclusion that the noise he heard was the disengaging of the brakes or the locks on the brakes.

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Previously, plaintiff had testified that he had been working with this type of scaffold for over two years prior to the accident and had been using the particular scaffold involved in the accident three or four times a week for approximately one year prior to the accident.

Harry testified he was familiar with the sound the locks and brakes made, specifically describing an incident a few weeks prior to the accident during which he heard the same clinking noise immediately before the scaffold began rolling. Harry safely descended during that incident and discovered the locks and brakes had disengaged. Plaintiff further testified that the clinking noise was caused by a weak spring in the locks which allowed it to disengage, and the noise was created when the plunger came out of the slot.

Defendant argues that plaintiff on cross-examination could not explain how disengaging the lock made a sound when he was not able to demonstrate such a noise; that plaintiff only established sound when he engaged the lock. Such discrepancies go to the weight of the evidence and are matters for the jury.

The trial judge erred. The testimony should have been admitted. Harry had a basis, through experience, for his opinion.

For the reasons stated above, the judgment of the trial court is Reversed.

Chief Judge MORRIS and Judge ARNOLD concur.

IN THE MATTER OF: ISIAH HORNE

No. 803DC671

(Filed 16 December 1980)

1. Infants § 17— juvenile delinquency proceeding — inculpatory statement — respondent advised of rights — voir dire — failure of court to make findings and conclusions

In a juvenile delinquency proceeding where it was alleged that respondent feloniously broke into and entered a grocery store and stole merchandise having a value of \$230, there was no merit to respondent's contentions that he was not advised of his right to have a parent present before making an inculpatory statement during an in-custody interrogation, that he did not waive his rights, and that the court should have made findings of fact and conclusions of law in support of its order denying respondent's motion to suppress the statement, since the court properly conducted a voir dire hearing for the purpose of determining the admissibility of the

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statement in question; the uncontradicted evidence at the hearing was that respondent was fully advised of his constitutional and statutory rights; and the court's failure to make findings of fact and conclusions of law in support of its order denying the motion was not reversible error, since no conflict of evidence existed at the hearing.

2. Infants § 17; Constitutional Law § 77 — juvenile delinquency proceeding — respondent's waiver of rights

There was no merit to respondent's contention that because the State failed to show a specific waiver of respondent's constitutional and statutory rights, it failed to sustain its burden of showing a knowing, willing and understanding waiver, since respondent was advised orally of his constitutional rights and his right to have a parent present during questioning; respondent read a copy of his constitutional rights, but that copy did not contain his right to have a parent present; respondent never signed a written waiver of his rights; but respondent stated that he understood his rights and then confessed to the crime.

3. Infants § 18— juvenile delinquency proceeding — transcript of respondent's inculpatory statement — officer's testimony from own recollection

In a juvenile delinquency proceeding respondent failed to show that the trial court abused its discretion in admitting testimony of an investigator regarding the substance of respondent's inculpatory statement, since the trial judge was in a position to determine whether the witness was merely reading from a written transcript of respondent's statement or was relying on his own recollection, and there was no indication in the record that the officer's testimony was not based on his own recollection of the statement which respondent made to him.

4. Searches and Seizures § 10— juvenile delinquency proceeding — warrantless detention of respondent — officer's reasonable suspicion that respondent committed crime

An officer had an honest and reasonable suspicion that respondent in a juvenile delinquency proceeding had committed the crime of larceny which justified the officer's detention of respondent where the evidence tended to show that officers heard a radio dispatch at 1:00 a.m. concerning suspicious characters pulling a wagon containing what appeared to be a television; upon sighting the described individuals, the officer stopped his car beside them whereupon one suspect fled; and the box on the wagon contained various merchandise which was in plain view.

5. Searches and Seizures § 33— warrantless search of box in respondent's possession — items in plain view

There was no merit to respondent's contention that the trial court erred in admitting into evidence merchandise found in respondent's possession on the ground that the officer who detained respondent had no authority to search the box in respondent's possession which contained the merchandise, since the cigar box in question was contained in a larger, open box along with various articles of merchandise and was in plain view; the fact that the officer opened the cigar box to find some identification was of no consequence; and respondent had no expectation of privacy with regard to the contents of the cigar box, as a cigar box is not normally used and was not being used by respondent as a repository of personal items.

6. Infants § 18; Larceny § 7.2— juvenile accused of felonious larceny — identification of items in juvenile's possession

In a juvenile delinquency proceeding where it was alleged that respondent

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feloniously broke into and entered a grocery store and stole merchandise having a value of \$230, there was no merit to respondent's contention that merchandise found in his possession was not sufficiently identified as the merchandise stolen from the store in question and the State therefore could not rely upon the doctrine of possession of recently stolen property to raise the presumption that respondent stole the missing items, since the grocery store owner's testimony identifying the goods as those taken from his store and the close proximity in time and location of the respondent and the goods to the crime scene were sufficient to raise a reasonable and logical inference that the goods found in respondent's possession were the goods stolen from the witness's store.

APPEAL by respondent from *Ragan, Judge*. Judgment entered 27 March 1980 in District Court, CRAVEN County. Heard in the Court of Appeals 13 November 1980.

This juvenile delinquency proceeding was commenced against the respondent, a fifteen-year-old boy, by a verified petition alleging that on 25 January 1980 Horne wilfully and feloniously broke into and entered a building occupied by E. C. Richardson, used as a grocery store, and stole and carried away merchandise having a value of \$230.00 in violation of N.C. Gen Stat. §§ 14-54(a) and 14-72.

Evidence presented at the hearing tended to show that Officers T. R. Dunn and Claude I. Brantley, Jr., who were in separate patrol cars, responded to a radio transmission at about 1:00 a.m. on 25 January 1980 in New Bern. The transmission advised them that two black males had been observed pushing or pulling a wagon with a box or what looked like a television set on it. When Brantley arrived, he saw two black males pulling a wagon. One of them jumped a wall and fled when the officer stopped his car. The other, Isaiah Horne, remained by the wagon on which a large open box was sitting. Brantley saw cigarette cartons, candy and cookies in the box. He looked inside the box and opened a cigar box to see if he could discover from where the items came. He found a tax receipt to a Mr. Richardson. At that time, Horne was about a block and a half from Richardson's store. Brantley put the box and wagon in his patrol car, detained Isaiah Horne, and went to assist Dunn. In the meantime, Dunn had chased the fleeing suspect and had apprehended him. Dunn then started checking the area for a possible breaking and entering and discovered an open window and an open apartment door in Richardson's grocery store. The juveniles were taken to the police department where they were arrested. Dunn testified that Horne told him he had gone inside Richardson's store, had rifled through the merchandise and had put it in a box which he took to the railroad tracks and placed on a wagon.

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E. C. Richardson, the grocery store proprietor, testified that he had given no one permission to enter his building on the night of 25 January 1980. The officers had taken him to his store on the night in question where he had noticed that some things were missing from his store and that things had been moved, but he was not sure what they were. He recognized the box and its contents as his property. On cross-examination he stated that the big box had been shipped to him with dinner napkins in it. He admitted that probably thousands of such boxes had been shipped to other stores. Richardson had not stamped the cigarette cartons with prices and he testified that probably every store in New Bern had bought candy bars like those returned to him by the officers.

The court found respondent to be a delinquent child by reason of violation of G.S. 14-54(a) and G.S. 14-72 and sentenced respondent to serve a term of two years in the custody of the Division of Youth Services. Respondent appealed. Other pertinent facts appear in the body of the opinion.

Attorney General Edmisten by Associate Attorney General Sarah C. Young, for the State.

Ward, Ward, Willey and Ward, by Joshua W. Willey, Jr., for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Respondent assigns as error the trial court's failure to suppress an inculpatory statement made by him during in-custody interrogation and the subsequent admission of the statement into evidence over objection. Respondent contends he was not advised of his right to have a parent present, that he did not waive his rights and that the court should have made findings of fact and conclusions of law in support of its order denying respondent's motion to suppress the statement. After carefully scrutinizing the record on appeal, we find that respondent's contentions have no merit.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966), the United States Supreme Court held that a suspect must be informed of his rights upon being arrested: the right to remain silent, the right to an attorney and that any statement made may be used as evidence against him. In addition to the above-mentioned constitutional rights, our legislature has granted to juveniles the additional right to have a parent, guardian or custodian

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present during questioning. N.C. Gen. Stat. § 7A-595(a)(3). A defendant may effectively waive these rights if done voluntarily, knowingly, and intelligently. *Miranda v. Arizona, supra*. The State may not use evidence obtained as a result of custodial interrogation against the juvenile at trial unless and until it demonstrates that the warnings were made and that the juvenile knowingly, willingly and understandingly waived them. N.C. Gen. Stat. § 7A-595(d).

In the case *sub judice*, the court properly conducted a *voir dire* hearing for the purpose of determining the admissibility of the statement in question. The only person to testify at the hearing was Investigator Dunn. Prior to the *voir dire* hearing, Investigator Dunn testified that he had advised respondent orally of all of his constitutional rights as required by *Miranda v. Arizona, supra*, and of his right to have a parent present during questioning. Investigator Dunn testified that respondent had stated that he understood his rights and that respondent also had read a copy of his constitutional rights. During the *voir dire* hearing, Investigator Dunn testified that the written copy of his rights that respondent had read did not contain his right to have a parent present. The record indicates that the respondent never signed a written waiver of his rights. After being advised of his constitutional rights and stating that he understood them, the respondent confessed to the crime.

The uncontradicted evidence at the *voir dire* hearing was that the respondent was fully advised of his constitutional and statutory rights. In addition, the trial court's failure to make findings of fact and conclusions of law in support of its order denying respondent's motion to suppress is not reversible error. "When no material conflict in the evidence on *voir dire* exists, it is not error to admit a confession without making specific findings of fact, although the better practice is always to find all facts upon which the admissibility of the evidence depends." *State v. Siler*, 292 N.C. 543, 549, 234 S.E. 2d 733, 737 (1977). Therefore the only remaining question with regard to this assignment of error is whether the respondent knowingly, willingly and understandingly waived his rights.

[2] Respondent relies upon *Miranda v. Arizona, supra*, and *State v. Siler, supra*, in support of his argument that because the State failed to show a specific waiver of respondent's rights, it failed to sustain its burden of showing a knowing, willing and understanding waiver. We feel, however, that this case is governed by the later cases of *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979)

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and *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954 (1979). In *Butler*, the United States Supreme Court repudiated the North Carolina rule that the State must show an express written or oral statement of waiver of rights before a confession may properly be admitted into evidence. The *Butler* court stated that the question of whether a defendant knowingly, intelligently and voluntarily waived his rights must be determined on a case-by-case basis, based on the circumstances of each case. The court stated:

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

441 U.S. at 373, 60 L.Ed. 2d at 292, 99 S.Ct. at 1757.

In *Butler*, the defendant was informed of his rights upon arrest, stated that he understood those rights, but refused to sign a written waiver. After stating "I will talk to you but I am not signing any form" he made inculpatory statements. 441 U.S. at 371, 60 L.Ed. 2d at 291, 99 S.Ct. at 1756. The Court found that under those circumstances the defendant's statements were admissible. In *Connley, supra*, the defendant was advised of his rights, stated that he understood those rights and refused to sign a written waiver. After stating "I know what it says and I understand, but I'm not going to sign it" defendant made inculpatory statements. 297 N.C. at 587, 256 S.E. 2d at 236. Our Supreme Court held that the defendant's statements were admissible.

We see no material distinction in the circumstances surrounding the waiver of rights in the case *sub judice* and those found in *Butler* and *Connley*. Therefore we hold that the trial court was correct in admitting the statement in question into evidence.

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[3] The respondent also contends that the trial court erred in admitting the testimony of Investigator Dunn regarding the substance of respondent's inculpatory statement. The record reveals that Investigator Dunn made a recording of respondent's statement which was subsequently transcribed by someone other than the officer and then erased. The respondent had neither acknowledged nor signed the statement. When Investigator Dunn began testifying by referring to the transcript, defense counsel, with the court's permission, asked the officer if he was reading from anything. The officer replied that he was. After stating that the witness could use the statement to refresh his recollection, the court allowed the officer to testify as to the substance of respondent's statement over defense counsel's objection. On cross-examination, defense counsel did not ask the officer whether his testimony had been based on his own recollection. Defense counsel did ask the officer "[t]hat piece of paper, that you refresh your memory with, what did the information on that piece of paper come from?" There is no indication in the record that the officer's testimony was not based on his own recollection of the statement which the respondent made to him.

Our Supreme Court held in *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977), that where there is doubt as to whether the witness is testifying from his own recollection, the use of the testimony depends upon the credibility of the witness and is a question for the trier of fact. Absent an abuse of discretion, the ruling of the trial court should not be disturbed on appeal. In the case *sub judice* the trial judge was in a position to determine whether the witness was merely reading from a written transcript of respondent's statement or relying on his own recollection. As respondent has failed to show any abuse of discretion, we will not disturb the trial court's ruling on appeal.

[4] Respondent further assigns as error the trial court's admission of the merchandise found in the respondent's possession into evidence. Respondent first contends that the officer had no justification for detaining him and next contends that even if the detention was justified, the officer had no authority to search the box containing the merchandise. We disagree.

Our Supreme Court has stated:

"The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of a routine

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investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest" (Citation omitted.)

State v. Allen, 282 N.C. 503, 508, 194 S.E. 2d 9, 13 (1973). This Court held in *State v. Bridges*, 35 N.C. App. 81, 84, 239 S.E. 2d 856, 858 (1978), that "a law officer . . . may lawfully detain a person where there is a need for immediate action, if, upon personal observation or reliable information, he has an honest and reasonable suspicion that the suspect either has committed or is preparing to commit a crime." The record discloses that the officers heard a radio dispatch at 1:00 a.m. concerning suspicious characters pulling a wagon containing what appeared to be a television. Upon sighting the described individuals, Officer Brantley stopped his car beside them, whereupon one suspect fled. The box on the wagon contained various merchandise which was in plain view. From the totality of these circumstances, we conclude that Officer Brantley had an honest and reasonable suspicion that the respondent had committed the crime of larceny which justified his detention of the respondent.

[5] In addition, we do not think the search of the cigar box which revealed a tax receipt to Mr. Richardson was illegal. The constitutional guarantee against unreasonable searches and seizures does not prohibit the seizure and introduction into evidence of contraband materials when they are in plain view and require no search to discover them. *State v. Allen*, *supra*. In the case at bar, the cigar box was contained in a larger, open box, along with various articles of merchandise and was in plain view. The fact that the officer had to open the cigar box to find the tax receipt is of no consequence. The respondent had no expectation of privacy with regard to the contents of the cigar box. A cigar box is not normally used, and was not being used by respondent as a repository of personal items. Thus our recent decisions in *State v. Greenwood*, 47 N.C. App. 731, 268 S.E. 2d 835 (1980), *disc. rev. allowed* (filed 7 October 1980), holding that the contents of a pocketbook found on the rear seat of an automobile should have been suppressed, and *State v. Cole*, 46 N.C. App. 592, 265 S.E. 2d 507, *rev. denied*, 301 N.C. 96 (1980), holding that the warrantless search of a jacket found in the trunk of a car was in violation of the Fourth Amendment, are distinguishable.

[6] Finally, respondent assigns as error the trial court's denial of his

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motion to dismiss the charge of larceny at the end of the State's evidence. He contends that the merchandise found in his possession was not sufficiently identified as the merchandise stolen from the store of E. C. Richardson and therefore the State could not rely upon the doctrine of recent possession to raise the presumption that the respondent stole the items in question.

It is axiomatic that "[t]he identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery." *State v. Jones*, 227 N.C. 47, 49, 40 S.E. 2d 458, 460 (1946); *in accord*, *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966). Respondent argues that because Mr. Richardson admitted that there were no markings on the items of merchandise that would distinguish them from other similar merchandise sold at other stores, the merchandise was not sufficiently identified as that stolen from Mr. Richardson. We disagree. At the trial, Mr. Richardson was asked, "Did you recognize the contents [of the box]?" He replied "Every bit of it. I was the man that owned that property, me and my wife."

It is not necessary that stolen property be unique to be identifiable. Often stolen property consists of items which are almost devoid of identifying features, such as goods which are mass produced and nationally distributed under a brand name. When such items are the proceeds of a larceny their identity must necessarily be drawn from other facts satisfactorily proved. *State v. Crawford*, 27 N.C. App. 414, 219 S.E. 2d 248 *rev. denied*, 288 N.C. 732, 220 S.E. 2d 621 (1975). In the case *sub judice*, Mr. Richardson's testimony identifying the goods as those taken from his store and the close proximity in time and location of the defendant and the goods to the robbery site were sufficient to raise a reasonable and logical inference that the goods found in the respondent's possession were the goods stolen from Mr. Richardson's store. Moreover, respondent confessed to his participation in the crime. Therefore, respondent's motion for dismissal was properly denied.

In the trial we find no prejudicial error.

No error.

Judges VAUGHN and WELLS concur.

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PELHAM REALTY CORPORATION AND MODELLE SCISM v. THE BOARD OF
TRANSPORTATION (FORMERLY STATE HIGHWAY COMMISSION) OF THE STATE OF
NORTH CAROLINA

No. 8017SC463

(Filed 16 December 1980)

**Eminent Domain § 3.2— taking to provide access to property — area remote
from highway — no frontage road — no public purpose**

In plaintiffs' action to enjoin the taking of their property for the building of an access road from old U.S. 29 to the property of Vulcan Materials, Inc., allegedly necessitated by the upgrading of U.S. 29 from a single lane, unlimited access highway to a dual lane, limited access highway, the disputed access road, located as it was in an area remote from and not connecting to or entering at any point on U.S. 29, did not serve to facilitate access by the public or by Vulcan to U.S. 29, did not meet the statutory definition of a "frontage road" as that term is used in Article 6D of Chapter 136 of the General Statutes, was not necessary to provide access because all other access had been denied, and was intended to serve a private and not a public purpose.

APPEAL by plaintiffs from *Long, Judge*. Case docketed in CASWELL County, heard out of term and out of county in Wentworth, ROCKINGHAM County, by consent of the parties. Judgment entered 6 December 1979 in Superior Court. Heard in the Court of Appeals 6 November 1980.

This is a companion case to *Department of Transportation (Department) v. Pelham Realty Corporation* in which the Department initiated proceedings to condemn and take plaintiffs' property. In this case, plaintiffs seek to enjoin the taking. It has been agreed and stipulated by the parties that the record in this case will serve as the proper basis for decision in both cases.

The undisputed portions of the factual background are as follows. Plaintiffs are the owners of a 116 acre tract of land in the northwestern corner of Caswell County near the Virginia state line. Plaintiffs' property is traversed on its western boundary by U. S. Highway 29 and on its eastern boundary by the Southern Railway and old U. S. 29, which parallel each other. The segment of U. S. 29 traversing plaintiffs' property is in the process of being upgraded from a single lane, unlimited access highway to a dual lane, limited access highway. Vulcan Materials, Inc. (Vulcan) owns a large tract of land lying adjacent to and north of plaintiffs' property. Vulcan's property lies between plaintiffs' property and the Virginia state line, and

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extends significantly into the State of Virginia. In the process of upgrading U. S. 29, it was necessary for the Department to acquire a substantial portion of that area of Vulcan's property which fronted on U. S. 29. As a result Vulcan was denied its direct and previously unlimited access to the portion of U. S. 29 traversing its property. Vulcan did, however, retain access to its property from a public road in Virginia. To provide access from Vulcan's property to U. S. 29 the Department studied the feasibility of constructing a service or frontal road across the part of Vulcan's property immediately adjacent to the upgraded, limited access stretch of U. S. 29. These plans were abandoned in favor of building an access road to the Vulcan property adjacent to and paralleling the Southern Railway, near old U. S. 29, approximately four tenths of a mile east of U. S. 29. In order to build the access road to Vulcan's property, it was necessary for the Department to either purchase or take a strip of plaintiffs' property.

Subsequent to the Department's declaration of taking and the initiation of plaintiffs' action, the matter was heard before Judge Long without a jury. Judge Long made extensive findings of fact. On these findings, in the Department's action, he concluded that the taking of plaintiffs' land was for a public purpose and that the Department was entitled to prosecute its action to take plaintiffs' land. In plaintiffs' action, Judge Long concluded that the taking was for a public purpose, and denied plaintiffs' application for a permanent injunction.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by David F. Meschan, for plaintiff appellants.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

WELLS, Judge.

To put this dispute in clear perspective, we note that Judge Long's first conclusion of law was as follows: "1. Pursuant to G.S. 136-89.55, the Department of Transportation may construct such service road as in its opinion are [sic] necessary or desirable."

Article 6D of Chapter 136 of the General Statutes, entitled Controlled-Access Facilities, is the source of authority under which the Department may construct and maintain "a State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property,

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or others, shall have only a controlled right or easement of access.”¹ G.S. 136-89.55 is contained in Article 6D and in pertinent part reads as follows: “In connection with the development of any controlled-access facility the Board² of Transportation is authorized to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service or frontage roads and streets”

G.S. 136-89.49(3) defines a frontage road as follows: “‘Frontage road’ means a way, road or street which is auxiliary to and located on the side of another highway, road or street for service to abutting property and adjacent areas and for the control of access to such other highway, road or street.” We note that the statutory definition of a “frontage road” does not include the words “service road”, but that these terms are used synonymously throughout the article. For example, G.S. 136-89.52 provides that “the Department of Transportation may acquire private or public property and property rights for controlled-access facilities and service or frontage roads”

It is clear from the record and the Department’s brief that the Department seeks to justify the disputed road as a frontage or service road constructed as a part of the over-all project designed to upgrade a segment of U. S. 29 into a controlled-access facility. Due to its location at a considerable distance from the primary controlled-access facility, it does not appear that this particular road is a “frontage road”, as that term is used in the statute. Absent other justification, it would thus not appear that the disputed road has a public purpose. The Department argues, however, that under previous decisions of our Supreme Court, the public purpose doctrine has been expanded to include roads which are “by-products” of the construction of controlled-access facilities if such roads provide access to property which would otherwise be “landlocked” by the controlled-access construction. The “by-product” rationale was enunciated by the Court in *Highway Comm. v. School*, 276 N.C. 556, 173 S.E. 2d 909 (1970), hereinafter referred to as “Asheville School”.

In *Asheville School*, the disputed road, although located in the immediate vicinity of Interstate 40, a major controlled-access facility,

¹ G.S. 136-89.49(2)

² Now Department

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did not in the ordinary sense meet the statutory definition of a "frontage road". It was, in fact, a relatively short driveway leading from a frontage road into the residence of the Marshburns, whose property would have been completely landlocked³ by the construction of Interstate 40. The keystone on which the *Asheville School* rationale hinged is the landlocked condition of the property to be served by the disputed road. In *Asheville School*, there was no question that the Marshburn property was cut off from *all* public access. Similarly, in two cases relied upon by the court in *Asheville School*⁴, the disputed roads, built incidentally to the construction of controlled-access facilities, were built to serve property which would have otherwise been completely landlocked. Such is not the case here.

It is not disputed that the Vulcan property has access to a public road in Virginia. The Department argues that this aspect of this case is not controlling. Its position is that the Vulcan tract would be denied its previous access to U. S. 29 in *North Carolina* and that when the Department took Vulcan's North Carolina access, it was obliged to consider the property as landlocked. The Department's argument is not inherently unsound. North Carolina is a large state, with a diverse topography interspersed with mountains, streams, lakes, pocosins, and sounds. In such a physical environment, the term "landlocked" must be and is susceptible of various and relatively different shades of meaning and interpretation. We do not wish to lock the Department into any rigid, unyielding definition of "landlocked".

The evidence in this case clearly shows, however, that in the sense that term was used in *Asheville School*, Vulcan's property was not, in fact, landlocked in *North Carolina*. Vulcan's property fronts for a considerable distance along U. S. 29, where the Department originally contemplated constructing a frontage road to replace the access being denied Vulcan by the upgrading of U. S. 29 to a controlled-access facility. The topography of the land adjacent to U. S. 29 was such, however, that the Department chose to locate the "frontage" road to provide access to the "back" portion of Vulcan's property, near the railroad. The location of this "frontage" road was chosen because it

³ i.e., denied any access to any public road.

⁴ *Luke v. Massachusetts Turnpike Authority*, 337 Mass. 304, 149 N.E.2d 255 (1958) and *Andrews v. State*, 229 N.E.2d 806 (Ind. 1967).

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would be less expensive to build it there, and, as the evidence shows, because Vulcan preferred it there.

We thus arrive at the denouement in this case. The project necessitated the acquisition of property from Vulcan fronting on U. S. 29. Having been denied its previously existing access, Vulcan was entitled to be compensated not only for its land needed for the project but also for its loss of access. Our Supreme Court's decision in *Asheville School* makes it clear that the Department, in order to avoid having to pay Vulcan exorbitant compensation for the denial of access, may instead provide substitute access. The evidence in this case makes it clear that the Department exercised its discretion in such a manner. For the land and access rights acquired from Vulcan in the project, the Department agreed to pay Vulcan \$31,000.00 in cash and to construct a 4,200 foot access road to Vulcan's property.

It is at this point that this case becomes much more complicated. Primarily for economic reasons, the Department chose the disputed location rather than the location near and paralleling U. S. 29. We quote the pertinent findings of fact from Judge Long's order:

A frontage road lying immediately adjacent to new U. S. Highway 29 and providing substitute access to those parcels of land lying north of N.C. 700 on the east of existing U. S. Highway 29 was estimated to cost, due to topography, over \$140,000.00, and such a road was expected to be only minimally adequate.

A service road lying adjacent to the railroad right-of-way for the Southern Railroad had an estimated construction cost of approximately \$60,000.00 and could provide substitute access for those parcels losing access to existing new U. S. Highway 29 by reason of the construction of State Highway Project 8.1592901.

A total savings in right-of-way costs for those parcels of land to be served by the proposed service road was estimated to be \$171,774.00 by Department of Transportation officials, yielding an estimate net savings to the taxpaying public of North Carolina of more than \$100,000.00 in right-of-way costs for State Highway Project 8.1592901.

These findings of fact indicate that by "relocating" the

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service road, the Department could effect a total savings of approximately \$180,000.00. While plaintiffs dispute these findings, we believe them to be supported by the evidence. We do not conclude, however, that these findings support Judge Long's conclusion that the taking of plaintiffs' land was for a public purpose. The Department has the authority to procure by condemnation only such rights-of-way or lands as are necessary to properly prosecute and complete the project. While we conclude that the Department had the authority to construct the originally proposed frontal road adjacent to U. S. 29 to provide access to Vulcan's property, the question is whether the construction of this road in its disputed location was such a deviation from this project as to remove it from the scope of the project. We think that the answer must be that it was. We do not hold that there were no circumstances under which a "frontage road" may be located some distance from a controlled-access facility due to the requirements of topography, geography or protection of the natural environment. As indicated earlier in this opinion, we also recognize that the service or frontal road may legitimately serve but one landowner or parcel of land, as was the case in *Asheville School*, if as a by-product of the controlled-access construction, the affected parcel of land is denied all access. In such cases, however, the evidence must show that the proposed road either meets the statutory definition of a frontal road, or, that it was constructed to provide access where all other access has been denied.

We hold that the location of the disputed road in this case, located as it is in an area remote from and not connecting to or entering at any point on U. S. 29, does not serve to facilitate access by the public or by Vulcan to U. S. 29, does not meet the statutory definition of a "frontage road" as that term is used in Article 6D of Chapter 136 of the General Statutes, and, that in the disputed location, it is intended to serve a private, not a public, purpose. *See Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126 (1965).

Due to the nature of our holding, we do not reach or deal with plaintiffs' interesting argument that the taking in this case would constitute a substitute condemnation.⁵

The judgment of the trial court is reversed and this case is remanded for the purpose of entry of an order permanently enjoining

⁵ *See Highway Comm. v. Equipment Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972).

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the taking of plaintiffs' property for the disputed road at its presently proposed location.

Judges VAUGHN and MARTIN (Robert) concur.

DOUGLAS A. TUCKER v. GENERAL TELEPHONE COMPANY OF THE SOUTH-EAST

No. 8014SC342

(Filed 16 December 1980)

Arbitration and Award § 7; Master and Servant § 10.2— allegedly wrongful discharge of employee — grievance arbitrated — summary judgment for employer proper

In an action to recover damages for the alleged wrongful suspension or discharge of plaintiff from his employment with defendant, the trial court properly entered summary judgment for defendant where defendant's materials established that, except for a bargaining agreement, plaintiff's contract of employment was for an indefinite period of time, terminable at the will of either party; defendant suspended plaintiff for cause, these causes being substantiated by plaintiff's deposition; defendant had the right to suspend plaintiff conditioned or circumscribed only by the provisions of the collective bargaining agreement; plaintiff had previously initiated a grievance under the collective bargaining agreement disputing defendant's right to suspend him; the grievance culminated in arbitration; the decision of the arbitrator denied plaintiff's grievance; and arbitration of the grievance was final and binding on the parties.

APPEAL by plaintiff from *McKinnon, Judge*. Judgment entered 31 October 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 October 1980.

Plaintiff, an employee of defendant telephone company, brought this action seeking damages for the alleged wrongful suspension or discharge of plaintiff from his employment with defendant. The essential allegations in the complaint are as follows. Plaintiff was employed with defendant as a PBX (private branch exchange) installer. On or about 18 November 1977, defendant wrongfully suspended or discharged plaintiff and terminated his pay. The basis for plaintiff's wrongful suspension or discharge was a warrant for his arrest charging receipt of stolen property, issued by officers of the Durham Police Department. The charges were false and were dismissed on or about 26 October 1978. As a result of his wrongful discharge or suspension, plaintiff lost one year of wages, was embarrassed, and his reputation in the community was slandered.

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In its answer, defendant admitted plaintiff's employment and that one of the reasons for plaintiff's suspension was the criminal charges against him, but denied that the suspension was wrongful.

As a further defense, defendant alleged that defendant's employees are represented by a labor union and that plaintiff is a member of the union. The union contract with defendant provides for a four step grievance procedure, culminating in arbitration. Under the agreement, arbitration of a grievance is final and binding on defendant, the union and employees who are members of the union. Following his suspension, plaintiff filed a grievance which went to arbitration. The arbitrator found plaintiff's suspension to be justified. Defendant pleaded the arbitration and award in bar of the plaintiff's claim.

After the pleadings were joined, defendant moved for summary judgment, which motion was granted by the trial court. It is from this judgment that plaintiff has appealed.

Maxwell, Freeman, Beason & Lambe, P.A., by James B. Maxwell, for plaintiff appellant.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by William P. Daniell, for defendant appellee.

WELLS, Judge.

Plaintiff's sole assignment of error is to the trial court's granting of defendant's motion for summary judgment. On motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972). This burden may be carried by a movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce enough evidence to support an essential element of his claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in

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advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Moore v. Fieldcrest Mills, Inc.*, *supra*; *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). See also *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 657, 267 S.E. 2d 584, 586 (1980).

Plaintiff having asserted a cause of action for wrongful discharge or suspension of employment, and defendant having raised defenses to plaintiff's alleged cause of action, the question before the trial court on defendant's motion for summary judgment was whether defendant was successful in showing that plaintiff's claim was unfounded or had a fatal weakness.

In support of its motion, defendant presented the affidavit of F. C. White, defendant's vice president for personnel. White's affidavit stated that plaintiff was suspended from his position with defendant because plaintiff failed to cooperate with a company investigation, plaintiff had felony charges pending against him and adverse publicity was being generated by those charges, and plaintiff failed to comply with instructions by leaving his assigned work site without informing his supervisor. White also stated that at the time plaintiff was suspended there was a collective bargaining agreement in effect between defendant and the International Brotherhood of Electrical Workers, Local 289, and that plaintiff was a member of that union. Although White stated that certain articles of the collective bargaining agreement were attached to his affidavit as an exhibit, these articles were not included in the record on appeal.

Defendant also presented the deposition of plaintiff, in which he testified in pertinent part as follows:

I filed this Complaint alleging that I had been wrongfully discharged or suspended by General Telephone Company after I had been arrested by the Durham Police officers for Unlawfully and Wilfully Receiving Stolen Property. I filed suit because I didn't do anything wrong. I am a member of a union and am aware that there is a union contract at GTE. I followed four steps of the Grievance Procedure, which included an arbitration hearing. The arbitrator's award did not require GTE to rehire me.

....

At the time I was a PBX installer with GTE, which is

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basically, private business telephone exchanges. They are in banks and computer communications. We are able to pull up accounts by this system at various terminals within a bank.

In addition, I had worked on telephone lines at the police department and specifically, the police information network. . . . In my position I had authority to go into the main switchline at GTE's offices downtown and I had access to the police station's central communication office through security.

There are many burglar alarm systems in private homes around Durham that in some form do go through the central communications room at the police department and as a PBX installer, I had access to the room where those terminals were involved. I could monitor telephone conversations or telephone lines. If you are able to acquire access to the police communication network, you could monitor all telephone lines coming into the police department.

. . . There were some articles in the *Durham Morning Herald* concerning the Bills of Indictment which were secretly entered and the articles discusses [*sic*] the arrest of my brother and myself and our operation of TNT Auto Sales. There was also an article in *Durham Sun*. . . . The article in the *Sun* also indicated that the FBI was conducting a ten-state investigation involving myself and my brother.

. . . .

My supervisor and M. B. Henry first came to see me after the arrest when I was at Star Buick. They wanted to go to my car and have a little meeting. I refused to talk with them at that time.

. . .

. . . .

Earlier that day I had been to Stem, North Carolina. I had been assigned to go to Star Buick but I found they didn't need my services and so I was helping another routeman find a better route to go to Stem to work on Public Service's meter service out there. I don't believe I let my supervisor know where I was going at that time. I do not generally do this, but once in a blue moon, I do. I travel so much that there is no way I can stop to call my supervisor and tell him exactly where I have to go. I don't believe

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I ever told another employee that I had gone to Stem at that time. I had a paging system and am paged continually by the company. I believe that I told somebody at the time I went to Stem, "Man, if they want me, tell them I ain't here." They paged the man I was with and asked for me and I told them [*sic*] to tell them that I wasn't there, because it was almost 4:30 when I was anticipating getting back to work and I didn't intend to work past 4:30. I do not remember discussing that incident with the representatives at GTE at the first meeting. I do understand that they gave the other employee a reprimand for telling the paging service that he hadn't seen me.

....

... [T]he company told me there had been adverse publicity as a result of my arrest. They indicated to me that they were going to suspend me and that one of the reasons for this was the adverse publicity. I believe another reason they were going to suspend me was because of the indictment and arrest on the criminal charges. I was told that I was being suspended without pay, pending the resolution of the criminal charges.

Under the Grievance Procedure outlined in our union contract with the company, there is a grievance procedure. I believe that I made a first step grievance complaint to my immediate supervisor. The company didn't determine that I did not have a valid grievance. After that, I went to the second step and it was also determined there that I should not go back to work. I then went to the third level and was denied at that point as well. I believe I got a letter that told me my grievance had been denied. After that, I went to arbitration, which is the fourth and last step. There was an independent arbitrator who was here to hear that grievance. The company was represented by Mr. Tye and I was represented by a Mr. Lansden. Mr. Lansden made argument for me and examined witnesses called on my behalf. . . .

As a result of the arbitration hearing, the arbitrator denied my grievance. This was the same thing that had been done at the other three levels. A copy of that opinion is entitled "In the matter of Arbitration between General Telephone Company of the Southeast and International Brotherhood of Electrical Workers, Local 289". I was the grievant. On the very last page, the arbitrator made the statement: "For the reasons described

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herein, the Grievance is denied.”

....

The charges were ultimately dropped and I returned to work at the same job that I had been at and with the same seniority as before. I did not file any other grievances, but in fact filed this lawsuit after my return. . . .

I have a copy of the Articles of Agreement between General Telephone Company of the Southeast and Local Union 289, IBEW-AFL-CIO, which is effective March 27, 1977. All four stages of the grievance procedures, which included the arbitration, have denied grievance.

These materials establish that except for the bargaining agreement, plaintiff's contract of employment was for an indefinite period of time, terminable at the will of either party. *See Freeman v. Hardee's Food Systems*, 3 N.C. App. 435, 165 S.E. 2d 39 (1969) and cases cited therein. It also is clear from White's affidavit that defendant suspended plaintiff for cause (these causes being substantiated by plaintiff's deposition), and that defendant had the right to do so, conditioned or circumscribed only by the provisions of the collective bargaining agreement.

If plaintiff had a contract of employment pursuant to the terms of the collective bargaining agreement, upon which he might prosecute an action for wrongful suspension or discharge, such a claim could be grounded, if at all, only in the terms of that agreement. Defendant's materials showed that plaintiff initiated a grievance under that agreement disputing defendant's right to suspend him, that the grievance culminated in arbitration, and that the decision (award) of the arbitrator denied his grievance.

Under the provisions of G.S. 95-36.8^{1/}, such an award is final and binding on the parties to the arbitration proceedings. It is, therefore

^{1/} § 95-36.8. Enforcement of arbitration agreement and award.--(a) Written agreements to arbitrate labor disputes, including but not restricted to controversies relating to wages, hours and other conditions of employment, shall be valid, enforceable and irrevocable, except upon such grounds as exist in law or equity for the rescission or revocation of any contract, in either of the following cases:

- (1) Where there is a provision in a collective bargaining agreement or any other contract, hereafter made or extended, for the settlement by arbitration

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clear that defendant was successful in showing to the trial court that plaintiff's claim was either unfounded or had a fatal defect and that defendant was entitled to judgment as a matter of law.

In his brief, plaintiff asserts that the arbitrator's award was favorable to plaintiff on the issue of his entitlement to "back wages" and that because his action was to enforce the award, summary judgment was in error. In the alternative, plaintiff argues that if the issue of "back wages" was not addressed and resolved by the award, the trial court should have stayed the action instead of entering judgment because the issue of "back wages" was subject to further arbitration. In his attempt to support these arguments, plaintiff has quoted what he asserts to be certain portions of the award. We note that although it clearly appears from the record that the trial judge had the award before him during his consideration of defendant's motion, the award was not included in the record on appeal. It is the duty of the appellant to see that the record is properly prepared and transmitted. *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E. 2d 665, 666 (1972).

[W]hen the appealing party fails to include in the record on appeal all of the materials that the trial court had before it in ruling on the motion for summary judgment, this Court is unable to say that the trial court erred in determining that there was no genuine issue as to any material fact.

Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 638, 230 S.E. 2d 559, 561-62 (1976), *disc. rev. denied*, 292 N.C. 265, 233 S.E. 2d 393 (1977).

The judgment of the trial court is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

of a controversy or controversies thereafter arising between the parties;

(2) Where there is an agreement to submit to arbitration a controversy or controversies already existing between the parties.

(b) Any arbitration award, made pursuant to an agreement of the parties described in subsection (a) of this section and in accordance with this Article, shall be final and binding upon the parties to the arbitration proceedings.

Duckett v. Pettee

STATE OF NORTH CAROLINA EX REL SAM J. DUCKETT, GUARDIAN OF MAUDE JOHNSON DUCKETT, INCOMPETENT, v. JACK C. PETTEE; AETNA CASUALTY & SURETY COMPANY; MASTROM, INCORPORATED, *et al.* PROFESSIONAL MANAGEMENT AND MI PROFESSIONAL MANagements; J. B. SILER; THE STATE OF NORTH CAROLINA; AND THE HARTFORD ACCIDENT & INDEMNITY COMPANY

No. 7930SC1147

(Filed 16 December 1980)

1. Guardian and Ward § 12— annual premiums paid on bond — one continuing bond

Where individual defendant as guardian of an incompetent and defendant insurance company as surety executed a bond which provided that if the principal, as guardian of the incompetent, should in all things "administer said estate according to law and faithfully execute the trust reposed in him as such and obey all lawful orders of the Clerk of Superior Court or other Court touching the administration of the estate committed to him," the obligation of the bond would be void, the bond was one continuing bond, regardless of the fact that annual renewal premiums were paid; the bond was to remain in force for whatever length of time defendant remained guardian; and defendant insurance company's maximum liability over the entire term of the guardianship was \$6000, the face amount of the bond, rather than \$42,000 awarded by the trial court, which was the face amount of the bond multiplied by the seven years defendant was guardian.

2. Guardian and Ward § 12— action to recover on bond — new guardian qualified — accrual of cause of action

Where the individual defendant was removed as guardian for an incompetent, and plaintiff was appointed as guardian on 23 May 1977 and duly qualified, plaintiff's cause of action against the former administrator for \$147,000 due the incompetent and against the former administrator's surety accrued to plaintiff upon his qualification as guardian, and there was no merit to the surety's contention that recovery was limited to the amounts removed by the guardian during the three years prior to the date suit was brought, less any sums returned during that period.

APPEAL by defendant Aetna Casualty and Surety Company from *Ervin, Judge*. Judgment entered 6 July 1979, Superior Court, HAYWOOD County. Heard in the Court of Appeals in Waynesville, 26 August 1980.

Defendant Pettee qualified as Guardian for Maude Duckett, Incompetent, and filed his inventory reflecting \$129,571.42 in various items and categories of personal property and \$6,000 in real estate (as valued by the guardian). Defendant Aetna furnished Pettee's guardianship bond in the amount required by the clerk, defendant Siler, which was \$6,000. The guardian paid annual premiums but the bond

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was never increased. Defendant Mastrom, Incorporated, a company in which the defendant Pettee owned an interest, prepared annual accountings for defendant Pettee.

From the date of his appointment in 1968, to 1977, the date of his removal, defendant Pettee as guardian, from the funds of the incompetent, loaned to Thermal Belt Air Service, Inc., a corporation in which he owned a substantial interest, the total sum of \$147,742.50 and guaranteed the notes given by Thermal. Each accounting prepared by Mastrom reflected these loans. Each year, the clerk accepted the accounting filed. Defendant Hartford carried the insurance on the clerk. The corporation, Thermal, could not pay the notes when due although some payments have been made resulting in a balance due of \$126,000.

Plaintiff seeks to recover \$6,000 from defendant Aetna.

Plaintiff seeks to recover \$100,000 from defendant Hartford.

Plaintiff seeks to recover \$126,000 from defendant Siler.

Plaintiff seeks to recover \$126,000 from the State of North Carolina.

Plaintiff moved for summary judgment against the defendants, defendant Aetna moved for summary judgment against plaintiff. A hearing was had, and the court allowed partial summary judgment on 6 July 1979. Judgment was entered against defendant Pettee for \$126,000 and against Aetna for \$42,000. The court did not rule on the motion of defendant Aetna. Defendant Pettee did not appeal, and the case is still pending against the other defendants. Defendant Aetna appealed.

Roberts, Cogburn and Williams, by Landon Roberts, for defendant appellant.

Roy H. Patton, Jr., and Long, McClure, Parker, Hunt and Trull, by Robert B. Long, Jr., for plaintiff appellees.

MORRIS, Chief Judge

[1] The first question raised by this appeal is whether the court erred in granting summary judgment against Aetna in the sum of \$42,000 which is seven times the \$6,000 face amount of the bond. Aetna contends that the bond was one continuing bond, regardless of the fact that annual renewal premiums were paid, and that Aetna's

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maximum liability over the entire term of the guardianship was \$6,000. We are constrained to agree.

The bond which was executed by Pettee as guardian and the Aetna as surety was as follows:

KNOW ALL MEN BY THESE PRESENTS that we, Jack Pettee, Asheville, N. C., as Principal, and Aetna Casualty & Surety Company, as Surety, are held and firmly bound unto the State of North Carolina, in the sum of \$6,000.00 Dollars to the payment whereof we bind ourselves and each of us, our heirs, executors and administrators, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the above bounden Principal, Jack Pettee, Guardian, of Maude Johnson Duckett shall in all things administer said estate according to law and faithfully execute the trust reposed in him as such and obey all lawful orders of the Clerk of the Superior Court or other Court touching the administration of the estate committed to him, then this obligation to be void; otherwise to remain in full force and effect.

The bond was dated 17 April 1968 and duly executed by the guardian and surety before the Clerk of Superior Court.

As was said in *Henry v. Wall*, 217 N.C. 365, 368, 8 S.E. 2d 223, 224 (1940):

The principal and his surety are liable under a contract expressed in definite terms and their liability cannot be carried beyond the fair meaning of those terms.

Necessarily, the determination of the question of the limits of liability of Aetna must depend upon the language of the contract. 17 *Couch on Insurance*, 2d § 68.46 (2d ed. 1967).

We find nothing in the language of the bond before us which would indicate any intent that the bond be anything other than continuous. The condition is that if the principal, as Guardian of Maude Duckett, "shall in all things *administer said estate* according to law and faithfully execute the trust reposed in him as such and obey all lawful orders of the Clerk of the Superior Court or other Court *touch-*

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ing the administration of the estate committed to him'', the obligation of the bond would be void. Clearly the bond went to the entire administration of the estate, not to a single year of the administration and would be void only upon the guardian's faithful administration of the estate. It is clear that the bond was to remain in force as long as Pettee remained guardian - whether six months or six years.

We think this bond is identical in intended coverage to the one in *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198 (1946). There the bond provided for the payment of any loss, not exceeding \$10,000, which the employer might sustain by reason of defalcation of the named employee "while in any position in the continuous employ of the Employer". The bond was kept in force by the payment of annual premiums. The Court, through Justice Barnhill, said:

The assumption of liability is not limited to one year or any other fixed term, to be extended or renewed upon the payment of a stipulated premium. *Woodfin v. Ins. Co.*, 51 N.C., 558; *Jacksonville v. Bryan*, 196 N.C., 721, 147 S.E., 12.

It guarantees the payment of any loss, not exceeding \$10,000, sustained by the bank through the dishonesty of Slayton *at any time during his continuous service as cashier*, "but before the Employer shall become aware of any default on the part of the Employee, and discovered before the expiration of three years from the termination of such employment or cancellation of this bond, whichever may first happen."

This language is clear and unambiguous. Plaintiff agreed to reimburse the bank for losses incurred during the life of the bond through the default of Slayton to the extent of \$10,000. It must be presumed the parties intended what the language used clearly expresses, *Kihlberg v. U.S.*, 97 U.S., 398, 24 L.Ed., 1106; 12 A.J., 752, and the contract must be construed to mean what on its face it purports to mean. *Hinton v. Vinson*, 180 N.C., 393, 104 S.E., 897; *McCain v. Ins. Co.*, 190 N.C., 549, 130 S.E., 186; *Wallace v. Bellamy*, 199 N.C., 759, 155 S.E., 856; *Jacksonville v. Bryan*, *supra*; *Thornton v. Barbour*, 204 N.C., 583, 169 S.E., 153; *Grocery Co. v. R.R.*, 215 N.C., 223, 1 S.E. (2d), 535; 12 A.J., 751.

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Other comparable fact situation cases appear to be in accord with the position we take here. *See annot.*, 7 A.L.R. 2d 946 (1949); *Montgomery Ward & Co. v. Fidelity & Deposit Co.*, 162 F.2d 264, (C.C.A. 7th Cir. 1947), (reh. den.) affirming as to this question, *Montgomery Ward & Co. v. Fidelity & Deposit Co.*, 65 F. Supp. 611, (N.D. Ill. 1946).

Plaintiff stressfully urges that the subsequent annual premiums paid were for additional bond coverage each year. The position of North Carolina on this question is set out by Justice Huskins in *Town of Scotland Neck v. Surety Company*, 301 N.C. 331, 337, 271 S.E. 2d 501, 504-05 (1980):

Where a bond is for an indefinite period running from a given date, annual premiums do not create a series of yearly contracts. *Scranton Volunteer Fire Co. v. United States Fidelity & Guaranty Co.*, 450 F.2d 775 (2d Cir. 1971); *Columbia Hospital v. United States Fidelity & Guaranty Co.*, 188 F.2d 654 (D.C. Cir. 1951); *Brulatour v. Aetna Casualty and Surety Co.*, 80 F.2d 834 (2d Cir. 1936). Paying annual premiums has no greater effect than to continue the existing contract. "By the general rule, a contract of fidelity guaranty insurance, although it may run indefinitely, runs for but a year at a time, and will not continue unless the premiums are paid. There is authority, however, that under a contract of fidelity guaranty insurance, by which, in consideration of an initial premium and subsequent annual ones, the insurer undertakes to indemnify the insured against loss, and which contains no provision for forfeiture or termination upon nonpayment, the payment of the annual premium is to be enforced as part of the consideration and not as a condition, and the obligation of the contract is therefore continuous and single, and a new assent or affirmative action is not necessary to keep it in force, even on a failure to pay an annual premium; rather, the contract runs until affirmative action is taken to avoid it." *Couch on Insurance* 2d § 30:9 (footnotes omitted).

See also Montgomery Ward & Co. v. Fidelity & Deposit Co., supra.

The evidence of the annual payment of premium is the *only* evidence in the Record before us which could be interpreted as evi-

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dencing an intent that the bond be cumulative. This is not enough. The Clerk quite obviously did not require a sufficient bond to cover the guardian's speculations. Nevertheless, Aetna can be held liable for only one penalty — the amount for which it contracted in the bond dated 17 April 1968.

[2] In its answer Aetna pled the three-year statute of limitations G.S. 1-52(6) and also made this a basis for its motion for summary judgment or judgment on the pleadings. In the partial summary judgment in favor of plaintiff against Aetna filed 6 July 1979 from which this appeal is taken, the court concluded "that Plaintiff's action is not barred by any statute of limitations and that plaintiff is entitled to Judgment against said Defendants as a matter of law." This conclusion Aetna contends is error. We do not agree.

G.S. 1-52(6) provides an action must be brought "(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of."

But the case before us does not present the usual or ordinary set of facts. Here the incompetent could not bring suit. It is the duty of the guardian to bring suit, when necessary, to recover any money due his ward. G.S. 33-20, *Kuykendall v. Proctor*, 270 N.C. 510, 155 S.E. 2d 293 (1967). No one could expect that the guardian here would bring an action against himself to recover for his own defalcation. Nor could one reasonably expect that the ward should be charged with his failure to do so. Aetna's position that recovery is limited to the amounts removed by the guardian during the three years prior to the date the suit was brought, less any sums returned during that period, is untenable under the facts and circumstances of this case.

The guardian was removed on or about 9 May 1977, having filed his purported final account on 22 March 1977. At that time, the sum of \$147,742.50 was not properly accounted for. Plaintiff was appointed as guardian on 23 May 1977 and duly qualified. We think the Court's statement in *Humphrey v. Surety Co.*, 213 N.C. 651, 197 S.E. 137 (1938), is applicable and controls here: "The amount due by the former guardian having been duly ascertained, his failure to account for and pay over to the relator the amount adjudged to be due was a breach of the bond which is sufficiently alleged in the complaint. This breach occurred within three years next prior to the institution of this action.

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Defendant's plea of the statute of limitations is without merit." 213 N.C. at 653, 197 S.E. at 138. *See also Dunn v. Dunn*, 206 N.C. 373, 173 S.E. 900 (1934), where Justice Connor, speaking for the Court, said:

It is well settled as the law in this State that where an administrator, who has not fully administered the estate of his intestate, has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administration *d.b.n.* of his intestate. *Tulburt v. Hollar*, 102 N.C., 406, 9 S.E., 430. The failure to account for and to pay such amount is a breach of the statutory bond, C.S., 33.

In such case, the cause of action accrues to the plaintiff upon his qualifications as administrator *d.b.n.* of the deceased, and arises as against both the former administrator and his surety upon a breach of his official bond. The action is, therefore, not barred as to the surety until the lapse of three years from the date of the qualification of the plaintiff as administrator *d.b.n.* of the deceased. C.S., 441(6).

206 N.C. at 374, 173 S.E. at 900-01.

Plaintiff's assignments of error Nos. 1 and 2, which are directed to the court's conclusion that the action is not barred by the statute of limitations, are overruled, and that portion of the judgment is affirmed.

That portion of the judgment of the trial tribunal which awards plaintiff a recovery of \$42,000 against Aetna Casualty and Surety Company is reversed, and the matter is remanded for entry of judgment in accordance with this opinion.

Reversed in part, affirmed in part and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

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HOYLE R. RIDENHOUR, EMPLOYEE, PLAINTIFF v. FISHER TRANSPORT CORPORATION, NON-INSURED, EMPLOYER, DEFENDANT

No. 8010IC453

(Filed 16 December 1980)

Master and Servant § 69.1— workers' compensation — permanent partial disability — capacity to earn wages as measure of disability

While in the ordinary case "disability" can be measured in terms of percentage, where, as in this case, the claimant has a pre-existing "disability" to the same part of the body which is affected by a subsequent compensable injury, "disability" must be measured in terms of capacity to earn wages; therefore, the Industrial Commission erred in denying plaintiff any compensation for permanent partial disability as a result of a compensable injury, since it was only after plaintiff's disability, both before and after the compensable injury, was related to and expressed in terms of plaintiff's capacity to function in his regular job of truck driver that the Commission could determine whether plaintiff was entitled to any compensation for permanent partial disability to his back as a result of the injury in question, and before the Commission can make such findings, there must be a new hearing to clarify the medical testimony.

APPEAL by plaintiff from the Opinion and Award of the *Industrial Commission* filed 5 October 1979. Heard in the Court of Appeals on 6 November 1980.

In this workers' compensation action, plaintiff seeks compensation for temporary total disability and permanent partial disability arising out of an accident occurring 4 June 1976 while employed by defendant. At a hearing conducted before Commissioner Coy M. Vance on 8 March 1979, testimony was taken from plaintiff and Dr. William Mason, an expert in the field of orthopedic surgery.

According to the record before us, Dr. Mason testified as follows:

Q. (Mr. Gray) Would you relate to the Commissioner what occurred or what observations you made as to Mr. Ridenhour's condition at a later time?

A. (Dr. Mason) I saw him on the 6th of October, three (3) days after discharge, doing well, removed sutures, wound was healing . . . and I felt at that time that he would never return to driving a truck or doing heavy labor. He was referred to technical institute for trade or some other work not using the back.

Q. (Mr. Gray) Did you at any time advise him to return to work?

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A. (Dr. Mason) I never advised him to return to truck driving.

Q. (Mr. Gray) Doctor, in reference to your examination and the medical history, do you have an opinion satisfactory to yourself as to whether or not Mr. Ridenhour has some permanent-partial disability after his spinal operation?

MS. BEHAN: Objection.

THE COURT: Overruled.

A. (Dr. Mason) Yes.

Q. (Mr. Gray) And, what is that?

A. (Dr. Mason) Approximately 30 percent.

Q. (Ms. Behan) Now doctor did you have x-ray examinations taken after the surgery performed in February of 1976?

A. (Dr. Mason) The myleogram we took in September was the only other x-rays following the ones Dr. Lockert took.

Q. (Ms. Behan) What did the myleogram in September, 1976 show?

A. (Dr. Mason) It showed that he had a defective nerve root on the right. Really compared to previous studies in February, 1976, it was somewhat increased.

Q. (Ms. Behan) When you say compared to his previous studies, what do you mean?

A. (Dr. Mason) His previous myleogram.

Q. (Ms. Behan) At that time, do you have an opinion as to Mr. Ridenhour's disability?

A. (Dr. Mason) At that time it was too early to make an opinion what this fellow's condition would be. I didn't give him a percentage of disability at that time. I reported findings and what we found in the surgery and how he was

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doing.

Q. (Ms. Behan) Do you have an opinion satisfactory to yourself as to the disability Mr. Ridenhour had undergone on that date?

A. (Dr. Mason) On that date, I was saying no. It was too early to tell how much problem he was going to have. They don't do all that well down the road.

Q. (Ms. Behan) Would you say doctor then if you had to give an estimate of disability, would you say 100%?

A. (Dr. Mason) No, I would *estimate* 30% disability, as he would have to leave his present occupation.

Q. (Ms. Behan) Would this exist after this type of surgery, this type of disability exist after surgery regardless of the patient?

A. (Dr. Mason) That is correct. I always return go to 20 to 30% permanent-partial disability simply for myself and you. It is not that great because we did not do that much heavy labor that will reinjure the back.

Q. (Ms. Behan) Now doctor, would this permanent-partial disability exist even after the patient has been released from your care?

A. (Dr. Mason) Correct. I used to give them 20 to 30% permanent-partial disability.

Q. (Ms. Behan) If a typical patient were released 6 months after the operation after a back operation of the nature you performed on Mr. Ridenhour, he would have a 30%?

A. (Dr. Mason) This is correct.

Q. (Ms. Behan) Now when you saw the patient in April of 1976, would you say that at that time he had a 30% permanent-partial disability?

A. (Dr. Mason) Right, at that time he was 10 weeks post-operative. If I was asked for a disability rating, it would be *approximately* 30%.

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Q. THE COURT: What was the date?

A. (Dr. Mason) April.

Q. THE COURT: Of 1976?

A. (Dr. Mason) Yes.

Q. (Ms. Behan) Now you say at this time you believe the patient has 30% disability? Is this opinion unchanged from what your opinion would have been in April of 1976?

A. (Dr. Mason) If I were asked, that is correct.

Q. (Mr. Gray) Let me ask you in English. After the first laminectomy and myelogram performed on Mr. Ridenhour in February of 1976, did you find or indicate to him to return to his original job as a truck driver?

A. (Dr. Mason) Yes, but no heavy lifting.

Q. (Mr. Gray) And after the second myelogram, do you have an opinion satisfactory to yourself as to whether or not Mr. Ridenhour could return to a job as a truck driver, after the second operation?

A. (Dr. Mason) Yes sir. At that time, I felt that with two back operations, his changes [sic] were great of having a third area, extrude at another level, and that he should not return to truck driving, as it would put increased stress on the lumbo-sacral spine.

Q. (Mr. Gray) Is that why you advised him to seek another type of employment secondary in nature?

A. (Dr. Mason) Yes sir, as a young person he done well. He would be able to be productive in supporting his family.

Q. (Mr. Gray) In reference to the operation that you performed on Mr. Ridenhour on those two different occasions, I believe you said when you performed this operation, the general partial disability is 20%, correct?

A. (Dr. Mason) Correct.

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plaintiff appealed to the full Commission. After a hearing, the Commission adopted the following findings and conclusions:

FINDINGS OF FACT

1. Plaintiff was a twenty-three year old male employee who had worked for the defendant-employer for one and a half months as a tractor trailer driver prior to June 4, 1976, the date of the alleged injury by accident.

2. There were two drivers per truck with each driver taking turns driving five hours each in order to keep the truck on the highway continuously. On June 4, 1976, Alex Goodman was plaintiff's driving partner.

3. The trip started with Mr. Goodman driving five hours to Spartanburg, South Carolina where plaintiff started driving and drove five hours. Mr. Goodman began his second turn at the wheel and had driven one and a half hours with the plaintiff in the sleeper. The truck was traveling at approximately forty miles per hour and went down an embankment at LaGrange, Georgia by-pass. The truck turned over tossing plaintiff out of the sleeper and into the windshield of the cab. He kicked the window out and crawled out of the cab.

4. Plaintiff was taken to the emergency room at the LaGrange, Georgia hospital and treated and released to go to his family doctor at home. He had a dull pain in the back. Plaintiff visited Dr. William T. Mason in Salisbury for the first time on June 24, 1976 after the accident. He visited Dr. Mason on July 9, and 30th and was admitted to the hospital on September 10, 1976. A myelogram was performed on September 27, 1976, and revealed a nerve root problem at L-4 and 5 and he had surgery. He was discharged from the hospital on October 3, 1976 and did well.

5. Plaintiff had a laminectomy on February 19, 1976 at L-4 and 5 and he did well after surgery. He was released on April 16, 1976 and was able to perform as a truck driver without difficulty. He obtained a 30 percent permanent partial disability to the back as a result of his surgery and was advised to do no heavy lifting.

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6. On June 4, 1976, plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant-employer.

7. As a result of this injury on June 4, 1976, plaintiff was temporarily totally disabled from June 4, 1976 to December 9, 1976 the date he reached maximum recovery.

8. Plaintiff still has a 30 percent permanent partial disability of the back; and there has been no change in his disability rating since the disability rating following the injury by accident sustained on 4 June 1976. This is in accordance with the opinion of Dr. William T. Mason, who was the physician that rated plaintiff, and who expressed the opinion that plaintiff's disability was unchanged.

Based upon the foregoing findings of fact the undersigned makes the following

CONCLUSIONS OF LAW

1. On June 4, 1976, plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant-employer. G.S. 97-2(6).

2. As a result of his injury by accident, plaintiff was temporarily totally disabled from June 4, 1976 to December 9, 1976; therefore, he is entitled to temporary total disability compensation for twenty-six (26) and a six-seventh (6/7) weeks. G.S. 97-29.

3. [Stricken by Full Commission]

4. As a result of the injury by accident giving rise hereto, plaintiff is entitled to medical expenses incurred and the defendant is responsible for paying such expenses in the amounts sent to the employer and approved by the North Carolina Industrial Commission. G.S. 97-25.

From the Opinion and Award of the Commission filed 5 October 1979 awarding plaintiff temporary total disability, assessing defendant for plaintiff's medical expenses arising out of the 4 June 1976 accident and costs, approving attorney's fees for plaintiff's counsel, and denying plaintiff any additional compensation for permanent partial disability.

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ity, plaintiff appealed.

Gray and Whitley, by J. Stephen Gray, for the plaintiff appellant.

No counsel for the defendant appellee.

HEDRICK, Judge.

The only question presented by this appeal is whether the Commission erred in denying plaintiff any compensation for permanent partial disability as a result of the injury by accident on 4 June 1976.

G.S. § 97-2(9) provides: "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Under our Workers' Compensation Act, therefore, loss of earning capacity is the criterion for the determination of disability. *Ashley v. Rent-A-Car Co., Inc.*, 271 N.C. 76, 155 S.E. 2d 755 (1967); *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E.2d 438 (1951). *See also Willis v. Reidsville Drapery Plant*, 29 N.C. App. 386, 224 S.E.2d 287 (1976).

In its Finding of Fact # 5, the Industrial Commission determined that plaintiff obtained a thirty percent (30%) permanent partial disability as a result of his "surgery" in February 1976 and in its Finding of Fact # 8, the Commission determined that plaintiff "still has a 30 percent permanent partial disability of the back; and there has been no change in his disability *rating* since the disability rating following the injury by accident sustained on 4 June 1976." [Emphasis added.] Assuming that these findings are supported by competent evidence in the record, the Commission has failed to make the critical finding whether plaintiff suffered any permanent partial *disability* as a result of the compensable 4 June 1976 injury. The statement by the Commission in Finding of Fact # 8 that Dr. Mason "expressed the opinion that plaintiff's disability was unchanged" is not a finding but merely a recital of Dr. Mason's opinion. Furthermore, if the Commission had found as a fact that plaintiff's "disability" was "unchanged," we could not say that such a finding was supported by the evidence in this record.

Because of the equivocal nature of Dr. Mason's testimony, we can understand the Commission's failure to make the critical finding as to permanent partial disability. While in the ordinary case "disability" can be measured in terms of percentage, where, as here, the claimant has a pre-existing "disability" to the same part of the body

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which is affected by a subsequent compensable injury, "disability" must be measured in terms of capacity to earn wages. Only after plaintiff's disability, both before and after the 4 June injury, is related to and expressed in terms of plaintiff's capacity to function as a truck driver can the Commission determine whether plaintiff is entitled to any compensation for permanent partial disability to his back as a result of the 4 June injury. Before the Commission can make such findings, it is necessary that there be a new hearing to clarify the medical testimony.

That portion of the Opinion and Award requiring defendant to pay temporary total disability and plaintiff's medical expenses arising out of the accident, and approval of attorney's fees for plaintiff's counsel is affirmed; that portion of the opinion and award denying plaintiff any compensation for permanent partial disability is vacated and the cause is remanded to the Industrial Commission for a further hearing with respect to whether plaintiff sustained any permanent partial disability as a result of the 4 June 1976 accident, more definitive findings thereto, and the entry of an appropriate order.

Affirmed in part; vacated and remanded in part.

Judges CLARK and WHICHARD concur.

DAISEY STEPHENS v. JUDITH BRAME MANN

No. 8010SC435

(Filed 16 December 1980)

Automobiles § 89.3— plaintiff thrown from pickup truck — insufficiency of evidence of last clear chance

In an action to recover for personal injuries sustained by plaintiff when she fell from the back of a pickup truck owned and operated by defendant, the trial court did not err in refusing to submit to the jury the issue of last clear chance, since plaintiff did not place herself in a position of helpless peril when she climbed into the back of the truck to hold down unsecured furniture, danger not being the equivalent of helpless peril; the evidence did not support a conclusion that once plaintiff entered the loaded truck and it began moving, she could do nothing to protect herself or was inadvertent to her precarious condition, because she was well aware that items had fallen out of the truck earlier but she was not holding on to anything as she rode; and defendant could not see plaintiff on the back of the truck and there was no evidence that she was aware of plaintiff's plight or that, had she been aware of it, she would have had a chance to avoid plaintiff's being thrown from the truck.

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APPEAL by plaintiff from *Herring, Judge*. Judgment entered 14 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 4 November 1980.

Plaintiff seeks recovery for personal injuries sustained when she fell from the back of a pickup truck owned and operated by defendant. Plaintiff alleges that defendant was negligent in driving an improperly loaded truck at a speed greater than reasonable and prudent.

Evidence for plaintiff tends to show that on 4 July 1978, plaintiff and defendant were moving furniture from Raleigh to Coats, North Carolina. The furniture belonged to a girlfriend of plaintiff's son Doug Stephens. The first load was delivered without incident. Another load of furniture was placed into defendant's truck. The load was not secured, and the tailgate was down. Plaintiff was seated in the cab of the truck and defendant was driving. Plaintiff's two sons, Doug and John, followed in separate vehicles.

As the truck travelled down Fannie Brown Road, a bookcase fell off. The bookcase was reloaded, and plaintiff got into the back of the truck to hold down the furniture. Plaintiff testified she didn't know if defendant told her she should not ride in the back, that it was dangerous. John Stephens testified that he did not hear such a warning.

Plaintiff was sitting on, or was propped against, some mattresses which were placed across a couch. Plaintiff was not holding on to anything. Defendant drove farther, accelerated, and a mattress flew up. Plaintiff braced herself with her feet, but was thrown onto the highway. John Stephens testified that defendant was travelling about thirty-five to forty miles per hour when he saw his mother fall.

Defendant moved for directed verdict at the close of plaintiff's evidence. The motion was denied.

Defendant's evidence tends to show that she had never moved furniture before and was unfamiliar with how it should be loaded. Before the second trip, Doug and John Stephens loaded the furniture into defendant's truck. During that trip, a mattress and a bookcase fell off the truck one or more times. Plaintiff decided to get in the back of the truck to hold down the furniture. Defendant told her she should not, that she might fall. Defendant drove more slowly because she knew plaintiff was on the back. Defendant was driving about twenty miles per hour, slowing down for a stop sign, when plaintiff fell off.

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The normal speed limit was fifty-five miles per hour. Defendant had just gone around a curve where the speed limit was posted at thirty-five miles per hour. She could not see plaintiff on the back of the truck before she fell.

Defendant's renewed motion for directed verdict at the conclusion of all evidence was denied. Issues of negligence and contributory negligence were submitted to the jury. The trial judge refused plaintiff's request for an instruction on last clear chance. The jury found both negligence on the part of defendant and contributory negligence by plaintiff. Judgment was entered in favor of defendant. Plaintiff's motion that the judgment be set aside and a new trial be granted was denied. Plaintiff appeals.

Sanford, Adams, McCullough & Beard, by J. Allen Adams and Charles C. Meeker, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by Richard B. Conely and George W. Dennis III, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff's sole assignment of error is the trial court's refusal to submit to the jury the issue of last clear chance. The doctrine of last clear chance allows a plaintiff to recover despite his own contributory negligence when the defendant could have avoided plaintiff's injuries by exercising reasonable care and prudence, after plaintiff's negligence had occurred, but failed to do so. *Earle v. Wyrick*, 286 N.C. 175, 209 S.E.2d 469 (1974), *rehearing denied*, 286 N.C. 547 (1975). The issue of last clear chance must be submitted to the jury if the evidence, viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine. *Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E.2d 497 (1978). However, "[n]o issue with respect thereto must be submitted to the jury unless there is evidence to support it" *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967). The burden is on the plaintiff to establish that the doctrine of last clear chance is applicable to the facts of his case. *Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977).

It is true, as plaintiff points out, that the North Carolina courts have liberalized the application of last clear chance in recent years. In *Presnell, supra*, Justice Higgins held that the doctrine may apply whether plaintiff's contributory negligence is a matter of law or a

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question of fact for the jury. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), the Supreme Court decided that contributory negligence would no longer nullify or cancel defendant's "original negligence" to bar application of last clear chance. In *Exum* Justice Lake observed that the doctrine of last clear chance is not a single rule, but a series of rules which differ depending on the factual situation.

[T]o bring into play the doctrine of the last clear chance, there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so. The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such "original negligence" of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved.

Id. at 576-77, 158 S.E.2d at 853.

In *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E.2d 307, *disc. rev. denied*, 300 N.C. 203 (1980), Chief Judge Morris summarized the elements of last clear chance as follows:

It is well established that in order to submit the issue of last clear chance to the jury, the evidence must tend to show the following elements: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.

Id. at 681-82, 262 S.E.2d at 309-10.

Thus, the doctrine of last clear chance is not a method of compar-

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ing the relative fault of each party, but is related to the determination of proximate cause. See *Vernon, supra*. It is well noted that under the doctrine, liability is imposed on a defendant only when he has had "a last 'clear' chance, not a last 'possible' chance to avoid injury." *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E.2d 770, 772 (1971). Accord, *Wise v. Tarte*, 263 N.C. 237, 139 S.E.2d 195 (1964); *Wray, supra*.

Applying the above stated law to the facts of this case, plaintiff has failed to establish that she had placed herself in a position of helpless peril which defendant saw and understood (or should have seen and understood) and that defendant could have, but did not, avoid the injury to plaintiff.

Plaintiff contends that she placed herself in a position of helpless peril when she climbed into the back of the pickup truck to hold down the unsecured furniture. In oral argument, plaintiff's counsel contended that the last clear chance doctrine came into play when defendant began driving under those circumstances. We do not agree. Although plaintiff may have placed herself in a dangerous position, danger alone is not the equivalent of helpless peril. The evidence does not support a conclusion that once plaintiff entered the loaded truck and it began moving, she could do nothing to protect herself or was inadvertent to her precarious condition. On the contrary, plaintiff testified that she was not holding on to anything as she rode. She was well aware that items had fallen out earlier, as that was the very reason she chose to ride in the back.

Although at trial plaintiff denied hearing defendant warn her of the danger of riding with the furniture, plaintiff now contends that defendant's alleged warning acknowledged her awareness of plaintiff's helpless peril. As we do not find plaintiff to have been in a helpless condition at the time defendant resumed driving, this argument is without merit. Only at the time the mattress began to rise up was plaintiff in a condition from which she could not protect herself. Defendant testified she could not see plaintiff on the back of the truck. There is no evidence to show that at that time defendant was aware of plaintiff's plight, nor that if she had been, she would have had a chance to avoid plaintiff's being thrown from the truck.

Plaintiff urges that her case is similar to the *Vernon* case, *supra*. In *Vernon*, the plaintiff was leaning against or sitting on the trunk of defendant's automobile. Defendant knew of plaintiff's position but

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started the car without warning as a joke. Plaintiff was unaware that defendant was in the car or that the vehicle would be moving forward. When it started, plaintiff fell and struck his head. The Court held that there was sufficient evidence of each element of last clear chance to submit the issue to the jury. Unlike the plaintiff in *Vernon*, plaintiff in the present case knew that the vehicle would be driven forward.

The situation in the case sub judice is more closely analogous to that in *Peeler v. Cruse*, 14 N.C. App. 79, 187 S.E.2d 396 (1972). There plaintiff fell from a motor grader while standing on a scraping blade. The machine slowed down and plaintiff released his grip. When the vehicle regained speed, plaintiff lost his balance and was run over by the grader. The Court stated: "When plaintiff got on the narrow blade, he assumed all of the natural risks incident to riding in such a dangerous position, including the risk that the machine would not be operated at a constant speed at all times and the risk that it might 'jerk' as he had observed it do on other occasions." *Id.* at 82, 187 S.E.2d at 398.

The other cases cited by plaintiff in support of her argument, *Exum, supra*, *Earle, supra*, and *Cockrell, supra*, are inapposite to the present case. In each of those cases there was evidence that the defendant had a clear and unobstructed view of the plaintiff, who was unable to extricate himself from his helpless position. *Exum* involved a plaintiff's intestate who was changing a tire of a car parked on the shoulder of a road and was struck by defendant's automobile. In *Earle*, defendant's vehicle struck a pedestrian walking in the street at night. The plaintiff in *Cockrell* was in a stalled automobile which was struck by an oncoming truck. In each of these cases the Supreme Court held that the doctrine of last clear chance was applicable, because there was evidence that the defendant could have seen the plaintiff and avoided the injury. In the present case, plaintiff was behind defendant and out of her view. Judge Herring properly refused to submit the issue of last clear chance to the jury. The assignment of error is overruled.

With this holding, it is unnecessary to discuss defendant's assignment of error regarding the trial court's refusal to grant her motions for directed verdict.

No error.

Chief Judge MORRIS and Judge WEBB concur.

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STATE OF NORTH CAROLINA v. LEMUEL BRYANT

No. 8018SC631

(Filed 16 December 1980)

1. Embezzlement § 5— items embezzled — admissibility to show crime committed

In a prosecution of defendant for embezzlement of merchandise from his employer, the trial court did not err in admitting testimony concerning certain State's exhibits and in admitting the exhibits consisting of cigarettes, matches, soup, soap and hams, since the items and the circumstances under which they were found were sufficiently identified and described by the officer who retrieved them, and since the evidence was relevant to show that the crime of embezzlement was committed.

2. Criminal Law § 75— confession — admissibility to show defendant as perpetrator

The trial court did not err in admitting into evidence a signed statement which defendant made before two people in the course of their investigation for the grocery store which employed defendant, since the statement was relevant for the purpose of showing that defendant was the perpetrator of the embezzlement charged.

3. Criminal Law § 106.4; Embezzlement § 6— proof of crime — defendant's confession corroborated

In a prosecution for embezzlement, evidence that defendant's employer sustained a loss of merchandise and that items bearing the employer's identification were recovered during a police investigation corroborated, however circumstantial, defendant's confession to the crime.

4. Embezzlement § 6— embezzlement of merchandise from grocery store —sufficiency of evidence

Evidence was sufficient for the jury in an embezzlement case where it tended to show that goods were stolen from a grocery store and that defendant, an employee of the grocery store, was the person who stole them.

APPEAL by defendant from *Long, Judge*. Judgment entered 20 February 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 November 1980.

Defendant was indicted for embezzlement of merchandise from his employer, Big Star Foods (hereinafter Big Star), a division of Grand Union Company, Colonial Stores Division.

The evidence for the state tends to show the following:

On 11 February 1979, detective Dean Harris of the Greensboro, North Carolina, Police Department retrieved merchandise from a

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residence, after receiving instructions to assist the vice squad. The cartons, and some of the individual goods, were stamped with the names "Big Star" and "Colonial Stores, Incorporated." Detective Harris contacted management personnel of Big Star, who began their own investigation. The merchandise was determined to be from Big Star Store #4715, where defendant was employed as a stock clerk. A computer statement for Store #4715 reflected an inventory shortage of \$7,373 for the period between 6 December 1978 and 31 March 1979.

On 27 April 1979, Bobby Balkcum and R. A. Studer, who assisted in Big Star's investigation, met with defendant to discuss the matter. Defendant said he had taken merchandise from the store after receiving a telephone call from an unknown person who offered to pay defendant for leaving merchandise behind the store. Defendant estimated he had taken merchandise worth approximately \$5,100 and received \$900 cash in exchange. He offered to reimburse Big Star. Defendant then wrote down his statement and signed it in the presence of Balkcum and Studer.

Defendant's motion for involuntary dismissal at the close of the state's evidence was heard out of the presence of the jury and was denied. Defendant presented no evidence. The jury returned a verdict of guilty of embezzlement. Defendant was given a split sentence and was ordered to pay \$5,100 in restitution. From this judgment, defendant appeals.

Attorney General Edmisten, by Associate Attorney Elaine J. Guth, for the State.

Herman L. Taylor, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant's first assignment of error deals with the admission of testimony concerning State's Exhibits 1 through 12, and admission of these exhibits into evidence. The exhibits consisted of half-cases or boxes of cigarettes, cases of book matches, soup, and soap, and a box containing hams. Defendant contends that no foundation was laid for testimony regarding the presence of these items at the residence at which they were found. He further argues that the evidence was irrelevant, as it did not connect defendant with the specific items nor with the residence.

When real evidence is properly identified, it is, in general, freely

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admissible. 1 Stansbury's N.C. Evidence § 117 (Brandis rev. 1973). *See also Kale v. Daugherty*, 8 N.C. App. 417, 174 S.E.2d 846 (1970). In *State v. Harbison*, 293 N.C. 474, 483, 238 S.E.2d 449, 454 (1977), the Court stated:

Objects offered as having played an actual, direct role in the incident giving rise to the trial are denoted "real evidence." McCormick, Evidence § 212 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 117, n. 1 (Brandis rev. 1973). Such evidence must be identified as the same object involved in the incident in order to be admissible. *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971). It must also be shown that since the incident in which it was involved the object has undergone no material change in its condition. *See McCormick, supra*, § 212, p. 527. *See also Hunt v. Wooten*, 238 N.C. 42, 76 S.E.2d 326 (1953). According to Professor Stansbury, when a tangible object is offered it must be first authenticated or identified, "and this can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is." 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973).

As there are no specific rules for determining whether an object has been sufficiently identified, the trial judge possesses, and must exercise, sound discretion. *Harbison, supra*. Once evidence is identified, a witness may properly testify concerning it. *State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65 (1972).

In the present case, before the exhibits were produced in the courtroom, Harris testified as to the circumstances surrounding his investigation of the residence in which the items were found. He described the articles that he discovered and noted the ownership markings thereon. The exhibits were then properly introduced as samples of the seized merchandise. Harris testified that the exhibits were in essentially the same condition as when he found them and transported them to the police station to be sealed and stored. An adequate foundation thus was laid for admission of Harris's testimony concerning the exhibits.

Real evidence, like all other evidence, is subject to a relevancy requirement. Stansbury's N.C. Evidence, *supra* § 117, n. 3. Evidence is relevant and admissible when it tends to show a connection with the

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commission of a crime. *Id.* at § 118.

It is a well-known rule that evidence is relevant if it has any logical tendency to prove a fact at issue in a case. In a criminal case every circumstance calculated to throw light on the supposed crime is admissible. It is not necessary that the evidence bear directly on the question; it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Pate, 40 N.C. App. 580, 585, 253 S.E.2d 266, 270, *cert. denied*, 297 N.C. 616 (1979).

No objection to evidence may be made solely on the ground that an object itself tends to prove more conclusively a fact in question than a description of that object by a witness. *State v. Brooks*, 287 N.C. 392, 215 S.E.2d 111 (1975).

The proof of every crime consists of two elements, that the crime charged was committed by someone, and that the defendant was the perpetrator of that crime. *State v. Jensen*, 28 N.C. App. 436, 221 S.E.2d 717 (1976); *State v. Thomas*, 15 N.C. App. 289, 189 S.E.2d 765, *cert. denied*, 281 N.C. 763 (1972). Evidence tending to show the first element, the *corpus delicti*, need not also identify the defendant as the one who committed the crime. *Thomas, supra*.

The exhibits offered in this case are relevant in that they tend to show that the crime of embezzlement was committed. The merchandise, bearing ownership identification of Big Star, was discovered in a vice squad investigation at a residence. Although the record is unclear as to whether the exhibits were ever formally admitted into evidence, they were unquestionably on display before the jury during witness Harris's testimony. As we find no reason why they should have been excluded from evidence or denied admission, the exhibits were the proper subject of testimony. See *State v. Carter*, 17 N.C. App. 234, 193 S.E.2d 281 (1972), *cert. denied*, 283 N.C. 107 (1973). Defendant's exception is without merit.

For the same reasons, we overrule defendant's assignment of error to the admission into evidence of State's Exhibit 14, the computer print-out sheet indicating an inventory shortage at Store #4715, and testimony relative thereto. Defendant argues that the summary

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does not concern the period involved in the charges against him. He further contends that it has no probative value as to stolen merchandise, because the statement indicates only general shortages from any causes.

The computer sheet contains a comparison of the inventory for Store #4715 on 6 December 1978 and 31 March 1979, and indicates there was an unexplained shortage of \$7,373 during that interval. The time for which defendant was accused of embezzlement in the indictment was from 11 December 1978 through 2 February 1979, which is obviously within the period the shortages occurred. The print-out, indicating a loss of merchandise, is relevant in its tendency to demonstrate that an embezzlement did occur. The state is not required to eliminate all other inferences. *State v. Macon*, 6 N.C. App. 245, 170 S.E.2d 144 (1969), *aff'd*, 276 N.C. 466 (1970). The computer statement and testimony regarding it were properly admitted into evidence.

[2] Defendant also assigns error to the admission into evidence of the signed statement he made before Balkcum and Studer in the course of their investigation for Big Star. Defendant asserts that the statement, in which he admitted stealing property belonging to his employer, is irrelevant, as it does not refer to specific times, items, or value, and has no connection to State's Exhibits 1-12. The confession is relevant in showing the second element of the crime, that defendant was its perpetrator. In proving the crime of embezzlement, it is not necessary for the state to prove that the defendant converted the property in question to his own use. *State v. Foust*, 114 N.C. 842, 19 S.E. 275 (1894); *State v. Smithey*, 15 N.C. App. 427, 190 S.E.2d 369 (1972). In *Smithey*, Judge Parker stated, "It is sufficient to show that the agent fraudulently or knowingly and willfully misapplied [the property], or that he secreted it with intent to embezzle or fraudulently or knowingly and willfully misapply it." *Id.* at 429-30, 190 S.E.2d at 370-71. Defendant's argument is frivolous, as the confession clearly tends to show that defendant was the perpetrator of the alleged embezzlement.

[3] Defendant contends that he cannot be convicted on his uncorroborated confession alone, citing as authority *State v. Sinclair*, 43 N.C. App. 709, 259 S.E.2d 808 (1979). Defendant is correct in his interpretation of the law, that more than a confession is necessary to sustain a criminal conviction. *E.g.*, *State v. Jenerett*, 281 N.C. 81, 187 S.E.2d 735 (1972); *Jensen, supra*; *State v. Lewis*, 18 N.C. 681, 198 S.E.2d

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57, *cert. denied and appeal dismissed*, 283 N.C. 756 (1973). However, it is also well established that independent evidence of the *corpus delicti* is sufficient to corroborate the confession. *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975), *death penalty vacated*, 428 U. S. 908, 49 L. Ed. 2d. 1213 (1976); *State v. Crawford*, 260 N.C. 548, 133 S.E.2d 232 (1963); *State v. Cope*, 240 N.C. 244, 81 S.E.2d 773 (1954); *Sinclair, supra*. In the record before us, there is ample evidence, in addition to defendant's statement, tending to prove the crime of embezzlement. The evidence that Big Star sustained a loss of merchandise and that items bearing Big Star's identification were recovered during a police investigation, corroborate, however circumstantially, defendant's confession. This assignment of error is overruled.

[4] We likewise overrule defendant's final assignment of error, the denial of his motion to dismiss. In deciding a motion to dismiss, the evidence must be viewed in the light most favorable to the state, with contradictions and inconsistencies ignored. *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975); *State v. McCaskill*, 47 N.C. App. 289, 267 S.E.2d 331 (1980). Here the state has presented evidence of each element of the crime of embezzlement under N.C.G.S. 14-90. *See Pate, supra*. There was evidence that goods were stolen from Big Star and that defendant, an employee of Big Star, was the person who stole them. We hold that defendant received a trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge WEBB concur.

W. B. WOLFE AND RUTH M. WOLFE v. MR. AND MRS. WILLIAM F. EAKER

No. 8027SC458

(Filed 16 December 1980)

1. Bills and Notes § 4— promissory note — loan to partnership instead of to plaintiff — failure to show want of consideration

In plaintiffs' action to nullify and have declared void a promissory note for \$12,500 executed by plaintiffs to defendants where defendants counterclaimed to recover on the note, plaintiffs failed to establish the defense of want of consideration and the trial court did not err in excluding evidence tending to show that the loan made by defendants went not to plaintiffs personally but to a partnership in which plaintiffs were involved, since the fact that the loan was to the partnership and not to plaintiffs personally did not establish want of consideration; the evidence disclosed detriment to defendant promisee in the amount of \$25,000; and since plain-

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tiffs got what they bargained for, as a matter of law this was sufficient consideration to support their promise to pay \$12,500, it not being essential that the consideration flow directly to plaintiffs.

2. Bills and Notes § 19— promissory note — failure to establish non-delivery

Where plaintiffs sought to nullify a promissory note executed by them to defendants but defendants counterclaimed to recover on the note, plaintiffs failed to establish the defense of non-delivery where the evidence tended to show that plaintiffs gave the note to their business partner with the intention that it be placed with his note and be given to defendant; this was done in defendant's presence and apparently with his consent; and plaintiffs presented no evidence of any doubts, reservations or conditions upon the surrender of the note.

3. Bills and Notes § 19— promissory note — loan to partnership — dissolution of partnership — evidence of dissolution agreement irrelevant

Where plaintiffs sought to nullify a promissory note executed by them to defendants but defendants counterclaimed to recover on the note, the trial court did not err in excluding evidence which plaintiffs claimed tended to show that (1) the loan by defendants went to a partnership in which one plaintiff was involved, (2) when the partnership was dissolved, the note was to have been discharged in consideration for plaintiff's partner receiving all the partnership's stock of building materials, and (3) one defendant knew that plaintiff derived no benefit from the partnership and that defendants' son received all of its funds, since plaintiffs made no attempt to show that defendant took any part in the agreement dissolving the partnership; plaintiffs' obligation ran to defendants; defendant would have had to bargain for plaintiff's release of his claim to partnership properties for the agreement to have had any relevance to the obligation between plaintiff and defendant; and absent evidence of fraud or collusion between plaintiff and defendant concerning the partnership dissolution, defendant's mere awareness of the wrongful acts of plaintiff's partner in diverting partnership funds would have no bearing on the obligation entered into between plaintiff and defendant.

4. Bills and Notes § 20— promissory note — judgment for face amount plus interest

Where defendants counterclaimed to recover on a promissory note in the amount of \$12,500, defendants were entitled to judgment as a matter of law, the parties had stipulated that the amount of interest due on the note was \$4941.67, and the jury returned a verdict for defendants in the amount of \$12,500, the trial court did not err in entering judgment n.o.v. for defendants in the sum of \$17,441.67.

APPEAL by plaintiffs from *Snepp, Judge*. Judgment entered 21 January 1980 in Superior Court, GASTON County. Heard in the Court of Appeals on 6 November 1980.

Plaintiffs bring this action to nullify and have declared void a promissory note dated 12 January 1976 in the sum of \$12,500.00 executed by plaintiffs to defendants and payable one year from date. Defendants counterclaim to recover on the note.

Plaintiffs allege that W. B. Wolfe and Charles F. Hewes were

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business partners in the Hewes Building Supply Company; that defendants loaned \$25,500.00 to the partnership; that the note in question was to secure one-half of the loan, a note in like amount to be executed by Hewes and wife to defendants to secure the other one-half of the loan to the partnership; and that the loan proceeds and the note were delivered to Hewes and wife, who diverted the loan funds to their personal use.

Defendants admitted the execution and delivery to them by plaintiffs of the \$12,500.00 note, denied that it was intended as security, and alleged the note was due and unpaid.

At trial plaintiff W. B. Wolfe testified that he and his wife executed the note for \$12,500.00 and got the money from Eaker for the partnership. Wolfe offered testimony that the loan proceeds were delivered to the partnership, that the partnership got in financial difficulty, and that he (Wolfe) in late 1976 sold his partnership interest to Hewes.

Defendant William F. Eaker testified that the plaintiffs' note was delivered to him and he paid the loan proceeds to the partnership.

All parties, plaintiffs and defendants, moved for directed verdict. The trial court directed a verdict against plaintiffs on their claim, but submitted the defendants' counterclaim to the jury with peremptory instructions.

Two issues were submitted to the jury as follows:

1. Did the plaintiffs execute and deliver to the defendants a promissory note, as alleged in the defendants' counter claim?
2. If so, in what amount are the plaintiffs indebted to defendants?

The trial judge gave peremptory instructions on both issues. On the second issue, the jury was instructed that all parties had stipulated that the amount of interest at 12% would be \$4,941.67.

The jury answered the first issue "Yes", and the second issue "12,500.00."

The defendants moved for judgment notwithstanding the verdict in the sum of \$17,441.67 as to the second issue. The motion was

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allowed, and judgment was entered for the defendants in that sum.

Hugh W. Johnston; Basil L. Whitener and Anne M. Lamm for plaintiff appellants.

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr. for defendant appellees.

CLARK, Judge.

At the close of plaintiffs' evidence the trial judge entered a directed verdict because the plaintiffs had produced no evidence of any of the allegations upon which they sought to establish their claim. The directed verdict against the plaintiffs on their claim was proper. Plaintiffs neither object, except nor assign error to the directed verdict against them on their claim, but instead argue alleged errors in directing the verdict on defendants' counterclaim. We hold that on the unique facts of this case the directed verdict for the defendants on the plaintiffs' claim required as a matter of law a directed verdict for the defendants on their counterclaim since the issues and the burden of proof were identical to those in the plaintiffs' original claim.

Defendants, on their counterclaim, met their initial burden of proof by producing a signed promissory note evidencing an obligation of \$12,500.00 "[P]roduction of the instrument entitles the holder to recover on it unless the defendant [herein the plaintiffs Wolfe] establishes a defense." G.S. 25-3-307(2). Plaintiffs then had the same burden in the defendant's counterclaim that they had in their original claim; *i.e.*, that of proving want of consideration and non-delivery, both defenses to their liability on the note, G.S. 25-3-306(c), and of proving discharge and satisfaction to the extent of the unknown amounts plaintiffs alleged defendants received from the partnership proceeds, G.S. 25-3-603(1). A directed verdict for defendants, even though they had the initial burden of proof, was proper where, as here, the controlling evidence was documentary and the non-movants failed to contradict or impeach it. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). See Note, *Directing a Verdict in Favor of the Party with the Burden of Proof*, 16 Wake Forest L. Rev. 607 (1980).

[11] Plaintiffs failed to establish the defense of want of consideration. Plaintiffs offered evidence that they executed the note for \$25,000.00 to the Hewes Building Supply. Hewes and Wolfe were partners in the building supply. Mr. and Mrs. Hewes were to have executed a note in like amount. Plaintiffs assigned as error the judge's exclusion of the

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evidence they claim tended to show that the loan went not to the plaintiffs personally, but to the partnership. That the loan was to the partnership and not to the plaintiffs personally does not establish a want of consideration. As noted in Official Comment 3 to G.S. 25-3-408, the consideration required under the Uniform Commercial Code, G.S. Ch. 25, is defined by the ordinary rules of contract law, which find consideration in either "some benefit or advantage to the promisor, or . . . some loss or detriment to the promisee." *Mills v. Bonin*, 239 N.C. 498, 502, 80 S.E. 2d 365, 367 (1954). The evidence disclosed detriment to the promisee Eaker in the amount of \$25,000.00. Also, since the Wolfes got what they bargained for, as a matter of law this was sufficient consideration to support their promise to pay \$12,500.00, it not being essential that the consideration flow directly to the plaintiffs. Plaintiffs' assignment of error to the judge's exclusion of evidence that the loan went to the partnership is overruled.

[2] Plaintiffs offered no evidence of non-delivery. The evidence showed that plaintiffs gave the note to Hewes with the intention that it be placed with the Hewes note and be given to Eaker. This was done in Eaker's presence and apparently with his consent. Plaintiffs presented no evidence of any doubts, reservations, or conditions upon his surrender of the note. "While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it under the power of the payee or of some third person for his use." 11 Am. Jur. 2d *Bills and Notes* § 276 (1963). We hold the delivery sufficient.

Plaintiffs presented not one scintilla of evidence to support their claim of discharge and satisfaction through the receipt by defendants of partnership proceeds.

[3] Plaintiffs assign as error, although their pleadings did not so allege, the exclusion of evidence which they claim if presented would tend to show that when the partnership was dissolved, the note was to have been discharged in consideration for Hewes receiving all the partnership's stock of building materials. They made no attempt, however, to establish that Eaker took any part in this agreement. Plaintiffs' obligation ran to the Eakers. Eaker would have had to

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bargain for plaintiffs' release of his claim to partnership properties for this agreement to have any relevance to the obligation between Wolfe and Eaker. The evidence does not support a finding that Eaker did more than *observe* the actions of Wolfe and Hewes during the dissolution of their partnership, nor does it suggest that Hewes had any authority, real or apparent, to bargain with Wolfe on Eaker's behalf.

Plaintiffs assign as error the trial judge's refusal to allow the examination of defendant William Eaker as to whether he knew that plaintiff, W. B. Wolfe, derived no benefit from the partnership and the defendants' son, Hewes, received all of its funds. Absent evidence of fraud or collusion or indeed of any dealing between Wolfe and Eaker concerning the partnership dissolution, we fail to see how Eaker's mere awareness of the wrongful acts of Hewes in diverting partnership funds should have any bearing on the obligation entered into between Wolfe and Eaker. Hewes' wrongful appropriation of partnership funds is a matter between Hewes and Wolfe. Absent evidence of involvement by Eaker, the wrongful appropriation of partnership funds should have no bearing on Wolfe's obligation under the promissory note.

Plaintiffs presented evidence that Eaker directed Hewes to deliver the note back to Wolfe. While this suggests that Eaker agreed to cancel the instrument, there is no evidence of any consideration for the agreement. As stated above, there was no evidence that Eaker bargained with Wolfe to gain for Hewes the partnership's stock in trade. Absent such evidence, we cannot see how Eaker, here the promisor, received any benefit from the agreement, nor can we see any detriment to the promisee Wolfe. *Mills v. Bonin, supra, c.f. G.S. 25-3-601(2)*. The Uniform Commercial Code does not provide for oral cancellation of negotiable instruments. *See G.S. 25-3-605 and North Carolina Comment to Subsection (1)(b)*.

[4] Since plaintiffs failed to establish any of the defenses available to them, defendants were entitled to recover on the note as a matter of law. The remainder of the plaintiffs' assignments of error may therefore be dismissed summarily. They assign error to the denial of the directed verdict in their favor on the defendant's counterclaim; but, of course, if, as we hold, defendant was entitled to a judgment as a matter of law, the judge did not err in refusing to direct a verdict against the defendant. They assign error to the granting of the defendants'

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motion for a judgment notwithstanding the verdict; but the judge's entry of judgment notwithstanding the verdict was proper under G.G. 1A-1, Rule 50(b)(1) since we hold that defendants were entitled to judgment as a matter of law and since a motion for directed verdict was made at the close of all the evidence. The parties had stipulated to the amount of interest due on the note at \$4,941.67. As a matter of law, defendant was entitled to the face amount of the instrument, plus the interest due and owing thereon: \$17,441.67. No error can be found in the judge's peremptory instructions to the jury since we hold as we do that the case should have never been submitted to the jury and since the trial judge had the authority under G.S. 1A-1, Rule 50(b)(1) to set aside the judgment and direct the entry of judgment as if the requested verdict had been directed. The plaintiffs' assignment of error to the signing and entry of the judgment is based on their claim that they "had no knowledge or information that such motion was made nor did they have an opportunity to make any presentation to the court as to why the motion should not be allowed." The motion and the trial court's granting thereof clearly appear in the record. This assignment is therefore dismissed as spurious.

The trial court's entry of judgment notwithstanding the verdict in the amount of \$17,441.67 is affirmed.

Judges HEDRICK and WHICHARD concur.

SCHLOSS OUTDOOR ADVERTISING COMPANY, PLAINTIFF v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF v. GODLEY REALTY COMPANY, THIRD PARTY DEFENDANT

No. 8026SC439

(Filed 16 December 1980)

Eminent Domain § 13— advertising sign cut down by city — action for inverse condemnation — sufficiency of complaint to state claim

The trial court erred in dismissing plaintiff's inverse condemnation suit for failure to state a claim upon which relief could be granted where plaintiff alleged that pursuant to a lease with a landowner, it constructed a large outdoor advertising sign on the property in question; the city then condemned the land for a sewage easement; the city failed to exercise reasonable diligence to discover plaintiff's interest in the land; the city's contractor entered the land and cut down plaintiff's sign which encroached on the city's easement; plaintiff rebuilt the sign; and plaintiff suffered monetary damages as a result of the city's actions.

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APPEAL by plaintiff from *Burroughs, Judge*. Order dismissing plaintiff's inverse condemnation suit for failure to state a claim upon which relief can be granted entered 15 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 November 1980.

The order of dismissal from which appeal has been taken was addressed solely to the sufficiency of plaintiff's complaint to state a claim upon which the court could grant relief. Accordingly, the only "facts" herein set out will be those alleged in the complaint, since it is the sufficiency of those allegations that we must decide.

Plaintiff entered into an agreement with the owners of a lot in Mecklenburg County whereby plaintiff would pay \$200 per annum for "the exclusive advertising privileges and rights of erecting and maintaining . . . advertising displays" upon said lot. The agreement, designated "Ground Lease #61," was executed and signed by the lot owner and an agent for plaintiff on 27 February 1976, the term being from year to year, automatically renewable up to seven years. The plaintiff does not allege the recordation of the agreement.

On 28 February 1977 the City of Charlotte adopted a resolution to condemn and on 31 March 1977, by the filing of a Complaint and Declaration of Taking and Notice of Deposit, condemned a perpetual sewerage easement through a portion of the lot along with a temporary construction easement. The lot's owners subsequently signed a consent judgment awarding them \$1,750.00 as just compensation for the taking. Plaintiff was never made a party to this condemnation action.

In July of 1977 employees of the Godley Realty Company, third party defendants herein and the contractor employed by the City to install the sewer, entered the lot to begin construction. They cut down and removed an outdoor advertising sign erected and maintained on the lot by plaintiff pursuant to its agreement with the owners, which sign apparently interfered with the City's easements.

Plaintiff brought this action for inverse condemnation alleging that defendant City took plaintiff's sign, entitling plaintiff to just compensation under the N.C. Const. art. I, § 19 (1970) and further seeking attorney's fees under G.S. 160A-243.1. The complaint alleges further that:

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“(12) Plaintiff has now rebuilt the sign which was torn down by the CITY; however, Plaintiff alleges upon information and belief that its rebuilt sign is still subject to the Defendant CITY’S easements taken by means of the exercise of eminent domain in the inverse condemnation of Defendant CITY.

(13) As a direct and proximate result of Defendant’s removal and inverse condemnation of Plaintiff’s sign, Plaintiff lost certain advertising revenues.

Plaintiff alleges upon information and belief that Plaintiff has been damaged in the amount of \$18,200.00 as a direct result of Defendant’s inverse condemnation.”

Defendant City moved under G.S. 1A-1, Rule 12(b)(6) to dismiss plaintiff’s complaint for failure to state a claim upon which relief may be granted. On 15 February 1979 an Order was entered dismissing plaintiff’s claim.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage for plaintiff appellant.

Office of the City Attorney by Deputy City Attorney H. Michael Boyd for defendant appellee, City of Charlotte.

Horack, Talley, Pharr & Lowndes by Robert C. Stephens and Thomas J. Ashcraft for third party defendant appellee.

CLARK, Judge.

A complaint should not be dismissed under G.S. 1A-1, Rule 12(b)(6), for failure to state a claim unless plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Sutton v. Duke*, 227 N.C. 94, 176 S.E. 2d 161 (1970); *Brown v. Brown*, 21 N.C. App. 435, 204 S.E. 2d 534 (1974). The only times, then, when dismissal is proper are: (1) when the complaint on its face reveals that no law supports plaintiff’s claim; (2) when the complaint reveals on its face that some fact essential to plaintiff’s claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff’s claim. *Mozingo v. Bank*, 31 N.C. App. 157, 229 S.E. 2d 57 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E. 2d 204 (1977). We find none of those three circumstances in this case and hold that the trial judge erred in dismissing plaintiff’s complaint for failure to state a claim. In examin-

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ing plaintiff's complaint, we have treated all of plaintiff's allegations as admitted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979).

The City's filing of its preliminary condemnation resolution of 28 February 1977 was subject to the requirements of G.S. 160A-246. That statute requires notice of condemnation proceedings to all "persons known to have an interest in the property" by way of listing their names and addresses in the resolution. G.S. 160A-246(a)(5). G.S. 160A-246(a)(5) further provides that a "person's interest in property shall be deemed known if it appears of record, or could or would be discovered by the exercise of reasonable diligence and expense." Plaintiff's allegation in the complaint that "Defendant City failed to exercise reasonable diligence to discover plaintiff's interest" and that plaintiff's sign was "prominently constructed upon the property" creates an issue of fact as to whether defendant City exercised the reasonable diligence required by the statute. If not, the apparent failure of plaintiff to record the interest should not deprive plaintiff of the notice to which it was statutorily entitled. Plaintiff would not be prejudiced by the lack of the required notice, however, unless its interest was affected by the City's condemnation. The real issue then is whether plaintiff has stated a sufficient claim for a taking without just compensation.

Plaintiff alleges that it has an interest in the land with which the City interfered and that the City through its contractor, cut down and removed plaintiff's sign. We believe these allegations are sufficient to state a good cause of action for inverse condemnation. The allegations in the complaint suggest:

- (1) that plaintiff had an interest in the land;
- (2) that pursuant to that interest plaintiff erected an outdoor advertising sign on the land;
- (3) that defendant City condemned an easement over that same land which included the sign;
- (4) that defendant Godley, acting under the authority of defendant City cut down and removed the outdoor advertising sign which had encroached upon the City's easement.

Our Supreme Court has stated, "It is fundamental law that when private property is taken for a public use or purpose, just

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compensation must be paid.” *Insurance Co. v. Blythe Brothers, Co.*, 260 N.C. 69, 78, 131 S.E. 2d 900, 907 (1963). Plaintiff’s complaint alleges that the sign was removed “in furtherance of the City’s purposes” in that the sign “was located on or interfered with the possession, control and use of Defendant’s . . . easements.” We hold that this allegation is sufficient to support the “public use or purpose” language quoted above.

The complaint alleges that plaintiff’s “interest in the property” included “an outdoor advertising sign prominently constructed upon the property.” This allegation satisfies the requirement that the taking be of “private property.”

There remains only the issue of whether the acts of the City, through the acts of its agent Godley Realty Co., constituted a “taking” under the definition of our Supreme Court as quoted above. The allegation that the City “cut down and removed” the sign indicates to us acts of dominion by the City (through its agents) inconsistent with the ownership of plaintiff. Plaintiff certainly should have been allowed to prove such, rather than being dismissed even before the summary judgment stage. To what *extent* the sign was “cut down and removed” and destroyed, if any, is a matter of proof by the plaintiff, but the allegation is sufficient to state a claim, when considered with other allegations in the complaint, for the taking of property without just compensation.

Plaintiff’s allegation that it “has now rebuilt the sign which was torn down by the City” causes us some concern. It is not clear from such a statement whether plaintiff means that it had to construct a totally new sign to replace the one allegedly taken by the City, or that it regained the original sign and re-erected it at its original site. We note, however, that mere vagueness is not ground for a motion to dismiss and that defendant was entitled to attack the allegation by a motion for a more definite statement under G.S. 1A-1, Rule 12(e). No such attack was made. For purposes of the Rule 12(b)(6) motion, the court must resolve the ambiguity in the above pleading in plaintiff’s favor.

Plaintiff’s claim for damages also gives us pause. It is not clear from the language of paragraph 13 of plaintiff’s complaint how it computes the \$18,200.00 it seeks, but in the sentence preceding the one setting out the amount of damages, the loss of “certain advertising

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revenues" is mentioned. We believe that lost profits are not properly compensable in an action for just compensation, *Williams v. Highway Commission*, 252 N.C. 141, 113 S.E. 2d 263 (1960); rather, plaintiff is limited to the diminution in the fair market value of its interest directly attributable to whatever taking it is able to prove.

Light Company v. Creasman, 262 N.C. 390, 137 S.E. 2d 497 (1964).

Of course, by holding as we do, we intimate no opinion as to the merits of plaintiff's claim. We simply hold that the allegations in plaintiff's complaint do give rise to certain conceivable sets of facts which, if proven, would support a claim for just compensation. We merely give plaintiff the opportunity to prove the facts necessary for its recovery.

Reversed and Remanded.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. BILLY RAY COLLINS

No. 8026SC668

(Filed 16 December 1980)

1. Criminal Law § 162— objection to evidence — similar evidence admitted without objection

Where defendant objected to evidence which had previously been admitted or was subsequently admitted without objection, defendant lost the benefit of his objection.

2. Robbery § 4.2— defendant as perpetrator of common law robbery — sufficiency of evidence

In a prosecution for common law robbery, evidence that defendant was the perpetrator of the crime charged was sufficient to be submitted to the jury where it tended to show that defendant had been in the victim's home earlier in the day of the incident; the victim's stepson was returning to the victim's home a short time afterwards when he found the front door locked, which he termed an "unusual" occurrence; after he knocked he heard the victim yell and then heard the back door slam; upon running to the rear of the house, the stepson saw defendant running away from the house with what appeared to be a rifle in his hand; a neighbor saw defendant inside the screen door of the victim's back entrance; and a rifle belonging to the victim was thereafter found at the home of defendant's cousin, where defendant himself was found by the victim's stepsons shortly following the incident.

3. Criminal Law § 124.1— verdict not signed by foreman — validity

There was no merit to defendant's contention that the verdict against him was invalid because the jury foreman did not sign it as required by G.S. 15A-1237(a),

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since the verdict substantially answered the issue so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 7 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 November 1980.

Defendant was charged under proper indictment with the common law robbery of Isiah Alspugh of \$2.50 in United States currency. Upon defendant's plea of not guilty, the State presented evidence tending to show the following:

On 20 October 1979, Isiah Alspugh, seventy-five years old, was at home alone sitting in a chair in the front room, when someone opened the front door and entered the house. The door was not locked because his sons "were out of the house and they 'come in and out,' and I hate to go to the door so often." The man who entered hit Alspugh and asked if he had any money. Alspugh said "no," and the man reached in and "tore the pocket off of my left pants pocket to get my pocketbook out and took the money which was about two dollars and some change; afterward, my wallet was lying on the floor." Alspugh could not remember how many times he was hit or what the man did after Alspugh was hit, as Alspugh was "knocked unconscious." Alspugh did not see the person who hit him, nor what the person used to hit him. Alspugh did not "come to" until about ten or fifteen minutes later, just before he was found by his stepson, Keith Ashford. Alspugh's face was swollen as a result of the incident, and Alspugh had not given anyone permission to take his money. Alspugh and his wife had a rifle in a locked bag in an upstairs closet, but he could not recall hearing anything upstairs after he was hit.

Alspugh's stepson, Keith Ashford, had been at the home of defendant's cousin, Gary Lee, shortly before 2:00 p.m. on 20 October 1979. Ashford had met defendant previously. Ashford, Lee, and defendant left Lee's home to pick up Lee's girlfriend and take her home. The three men then stopped by the Alspugh home for between five and fifteen minutes. Alspugh was on the front porch during this time. When the three men left, defendant said he was going to see a girlfriend; Ashford and Lee went to Lee's home for about fifteen minutes, and Ashford then returned to the Alspugh home. When Ashford got to the front door, the door was locked, which Ashford found "unusual." Ashford knocked, and he heard Alspugh yell. Then Ashford heard the back door slam, and he ran to the rear of the house and saw defendant running across a field in back of the house with

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"what looked like a rifle in his hands." A neighbor, Ruth Little, had seen defendant inside the screen door at the rear of the Alspugh home before this time, and she witnessed defendant's running out the back door and across the field.

After finding his stepfather, Ashford got his oldest brother, Nathaniel Ashford, and returned to the Lee home in search of the rifle. Defendant's girlfriend let them in the back door, and when they got inside, they noticed defendant "rattling" the front door. Defendant had a rifle, and he turned and started firing at the brothers. The Ashfords fled, with Nathaniel returning defendant's fire with a pistol.

When the police arrived shortly thereafter, the Ashford brothers returned to the Lee residence, where a rifle was found upstairs partially under a bed. Keith Ashford identified the rifle as belonging to the Alspughs. The rifle had "blood on it," and Keith Ashford observed that "[n]either I nor my brother was bleeding, but [defendant] was."

Defendant offered no evidence.

The jury found defendant guilty as charged, and from a judgment imposing a prison sentence of "not less than ten (10) years nor more than ten (10) years," defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

Assistant Public Defenders Cherie Cox and Ronald L. Chapman, for the defendant appellant.

HEDRICK, Judge.

[1] Based on his second assignment of error, defendant contends the court erred in allowing the witness Keith Ashford, when questioned whether he asked the neighbor, Ruth Little, if she saw what happened, to testify as to what Little said and to what his stepfather said. Defendant argues that this testimony was both hearsay and non-responsive, and should have been stricken. We do not agree. Ashford first testified that Little said, "I just seen that boy run out of here that was with you." Essentially the same testimony, however, was introduced into evidence without objection when Ruth Little gave testimony as a witness later in the trial. Ashford then testified that his stepfather said, "He took my money and hit me like that." Not only could this testimony be admissible under one of several exceptions to the hearsay rule, *e.g.* excited utterance, but this testimony also merely

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corroborated the testimony already given by the stepfather. Since the challenged evidence had either theretofore or thereafter been admitted without objection, defendant lost any opportunity he might have had to object. *State v. Campbell*, 296 N.C. 394, 250 S.E.2d 228 (1979); *State v. Hill*, 294 N.C. 320, 240 S.E.2d 794 (1978). Although defendant also contends this testimony was non-responsive, we think the trial judge in his discretion properly denied defendant's motion to strike, since the testimony helped set forth the events and circumstances surrounding the incident at issue. This assignment of error has no merit.

[2] Defendant's fourth assignment of error relates to the court's denial of defendant's motion to dismiss at the close of the evidence. Although defendant acknowledges that the evidence was sufficient to reach the jury on the question of whether the offense of common law robbery was committed, he contends that "there was not enough evidence, direct or circumstantial, to go to the jury on which they could find beyond a reasonable doubt that the defendant was the perpetrator of the crime of common law robbery." We disagree. On a motion to dismiss for insufficient evidence, the court must find that there is substantial evidence, whether direct, circumstantial, or both, that the offense charged has been committed and that defendant committed it, in order to properly deny the motion. *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979); *State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978). If, on the other hand, the evidence raises merely a suspicion or conjecture as to either the commission of the offense or defendant's identity as the perpetrator, the motion should be allowed *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977). The evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980); *State v. Irick, supra*.

In the present case, the evidence tends to show that defendant had been in the Alspugh home earlier on the day of the incident; that Keith Ashford was returning to the Alspugh home a short time afterwards when he found the front door locked, which he termed an "unusual" occurrence; that after he knocked, he heard Alspugh yell, and then he heard the back door slam; and that upon running to the rear of the house, Ashford saw defendant running away from the house with "what appeared to be a rifle in his right hand." The

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evidence also tends to show that a neighbor, Ruth Little, was carrying a load of clothes to a clothesline in clear view of the back door of the Alspugh home, when the following occurred:

I saw the defendant inside the Alspugh's screen door and the other door was open. He had been wearing a white shirt and black pants earlier. At that time, all he had was a little metal piece in his hand. He stood there smiling. I went inside and came back outside and hung some clothes while he just stood there. The screen door seemed to be "dragging" and suddenly, it flew open and he ran onto the back porch He ran down the hill. By that time, Keith came and asked if anyone came out of the apartment and I said "yes."

The evidence further tends to show that a rifle belonging to the Alspughs was thereafter found at the home of defendant's cousin, where defendant himself was found by the Ashford brothers shortly following the incident. In our view, the evidence not only strongly suggests that defendant was in the Alspugh home at the time of the incident in question, but it also raises the reasonable inference that defendant had to be the person who robbed Isiah Alspugh, and thus the trial judge properly denied defendant's motion to dismiss. This assignment of error has no merit.

[3] Based upon his fifth assignment of error, defendant contends that the verdict against defendant in this case was invalid because the jury foreman did not sign the verdict as required by G.S. § 15A-1237(a), which provides as follows: "The verdict must be in writing, signed by the foreman, and made a part of the record of the case." We do not agree. The Official Commentary to G.S. § 15A-1237 indicates that the section was intended to eliminate any ambiguity or confusion that might result from the giving of an oral verdict:

It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions. This procedure should cure a great many defects that occur when the foreman of the jury inadvertently omits some essential element of a verdict in stating it orally.

See *State v. Smith*, 299 N.C. 533, 263 S.E.2d 563 (1980); *State v. Good-*

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man, 298 N.C. 1, 257 S.E.2d 569 (1979). In the present case, no such omission was possible, since the written verdict form properly set forth, without any possibility of ambiguity or confusion, the essential elements of the verdicts that could be returned. Furthermore, if, as in this case, the verdict substantially answers the issue so as to permit the trial judge to pass judgment in accordance with the manifest intention of the jury, then the verdict should be received and recorded. *State v. Smith, supra*. This assignment of error is meritless.

Defendant's remaining assignment of error argued on appeal relates to the denial of defendant's motions to set aside the verdict and for a new trial. These motions were in turn based on the court's denial of defendant's motion to dismiss discussed heretofore. Obviously, this assignment of error merits no further discussion.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and WHICHARD concur.

UNITED VIRGINIA BANK/CITIZENS & MARINE v. ROBERT M. WORONOFF AND
PATRICIA B. WORONOFF

No. 803SC438

(Filed 16 December 1980)

Guaranty § 2— note guaranteed by defendants — summary judgment for plaintiff proper

In an action to recover on a note executed by a corporation and payable to plaintiff where plaintiff alleged that defendants unconditionally guaranteed payment to plaintiff by the corporation, that demand was made on the corporation for payment but no payment was made, and that demand was made on defendants for full payment but no payment was made, the trial court properly entered summary judgment for plaintiff since the record did not indicate any doubts, other than latent doubts, as to the credibility of plaintiff's affiant; defendants failed to introduce any materials in their favor; defendants did not point to any specific areas of impeachment and contradiction; and no genuine issue of material fact was raised, as defendants admitted the genuineness of the note and "Unconditional Guaranty" document under which they guaranteed payment of the loan balances due plaintiff, that their signatures appeared at the end of the guaranty document and their liability for the unpaid indebtedness was thus established, and that they never made any payments on the note and no payments were ever made on the note to the best of their knowledge.

APPEAL by defendants from *Jolly, Judge*. Judgment entered 20

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February 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals on 4 November 1980.

Plaintiff's complaint alleged that on or about 24 September 1977 Southern Hospital Supply, Inc. (hereinafter "Southern") made a collateral note payable to plaintiff in the amount of \$35,000 and bearing interest at ten percent (10%); that on or about 24 September 1977, defendants "executed a document entitled 'Unconditional Guarantee' whereby each guaranteed payment to the plaintiff herein by Southern Hospital Supply, Inc."; that Southern has filed for bankruptcy and "demand for payment has been made upon said corporation with no payment of the above-referenced note being made"; that demand was made of defendants for full payment of the note, but no payment was made; that plaintiff is entitled to attorney's fees of fifteen percent (15%) of principal and accrued interest pursuant to G.S. § 6-21.2; and that plaintiff recover the sum of \$35,000 principal, interest at the rate of ten percent (10%) up to and including 20 November 1978 in the amount of \$2,206.52, fifteen percent (15%) attorney's fees, and costs. Defendants answered 16 February 1979, denying the material allegations of the complaint, but admitting "that certain documents entitled 'Unconditional Guarantee' were executed." In addition, defendant Patricia B. Woronoff alleged that she was an "accommodation maker" within the meaning of G.S. § 25-3-415; that she "did not intend to guarantee or obligate herself for the present balance outstanding, if any, . . ."; that the indebtedness had been fully satisfied by prior payments by defendant Robert Woronoff and Southern; and that there was "a total failure of consideration for any alleged guarantee or co-obligation as alleged in the Complaint."

Plaintiff filed requests for admission of each defendant on 9 March 1979. The requests sought the admission of the genuineness of the collateral note and "Unconditional Guaranty" documents, the signatures of the defendants on the guaranty document, and the following allegations: that defendants made no payments on the note, that defendant knew of no other payments that were made upon the note, and that "there are no facts within your knowledge" which would indicate that Southern did not owe the funds and that each defendant did not guarantee payment of those funds. Also on 9 March 1979, plaintiff filed interrogatories and requests for production of documents of each defendant, asking, *inter alia*, to "[s]tate the circumstances under which you executed the unconditional guaranty."

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Responses to the requests for admissions were filed 8 May 1979. Defendant Patricia Woronoff admitted the genuineness of the collateral note document but denied the genuineness of the guaranty document, and in reference to her alleged signature, she denied that "said writing constitutes an execution in law." Defendant Patricia Woronoff admitted that she had no knowledge of any payments made on the note; but she was "not able to admit or deny" that no facts existed which would indicate that Southern did not owe funds on the note and that she guaranteed payment. Defendant Robert Woronoff answered in like manner to the genuineness of the documents, but admitted that his signature was on the guaranty document. He admitted that he had not made any payments on the note, but denied that he had no knowledge of any payments made, and that there were no facts indicating that Southern did not owe funds and that he guaranteed payment. Both defendants denied owing plaintiff the sums alleged in the complaint.

On 20 June 1979, plaintiff moved for an order compelling discovery of answers to certain questions in its requests for admission and interrogatories. Following a stipulation between the parties that defendants would answer the questions, defendants responded on 27 September 1979. Defendants admitted that the signature of Patricia B. Woronoff on the guaranty document was indeed the signature of defendant Patricia Woronoff, and defendant Patricia Woronoff stated that she had no "independent recollection" of ever having seen the collateral note document or of signing the guaranty document.

Defendants filed an amended response to plaintiff's requests for admission on 5 November 1979, admitting the genuineness of the collateral note document. Defendant Patricia Woronoff admitted she had no information that payments were made against funds allegedly owed, and defendant Robert Woronoff stated that "the facts showing the payment for the indebtedness of the alleged notes are within the knowledge and control of the Plaintiff, or are a part of the books and records of the corporation [Southern] . . ."

Thereafter, on 24 January 1980 defendant took a deposition of Jenny C. Brabrand, Commercial Administrative Officer for the plaintiff bank. She testified that her duties included examination of loan payment records, including that of the collateral note in question; that she did not witness the signing of the documents involved here, but she was aware of a loan by plaintiff to Southern; that an entry was

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erroneously made on the ledger sheet documenting the Southern note, but that the entry was subsequently corrected; and that no payments had been received on the note up to that time.

Plaintiff moved for summary judgment on 24 January 1980. In addition to its pleadings, requests for admission, interrogatories, request for production of documents, and the deposition plaintiff supported its motion with an affidavit of Jenny Brabrand, in which she stated that she had "examined and reviewed the bank files concerning loans" between plaintiff, defendants, and Southern; that the documents were genuine; that request for payment has been made upon defendants and Southern "with no payment forthcoming"; that the loan to Southern, with the guarantee by defendants, was actually made; and that the sums indicated in the complaint are "due and owing." Defendants relied on their pleadings and the evidence supplied by plaintiff as hereinbefore discussed in opposition to plaintiff's motion. From summary judgment entered for plaintiff in the amount of \$35,000 plus interest at the rate of ten percent (10%) up to and including 20 November 1978 in the amount of \$2,206.52, and fifteen percent (15%) of the total as attorney's fees, defendants appealed.

Ward and Smith, by Robert H. Shaw III, for the plaintiff appellee.

Trawick H. Stubbs, Jr., and Marcus W. Chestnutt, for the defendants appellants.

HEDRICK, Judge.

The sole question raised by this appeal is whether summary judgment was properly entered for plaintiff. A summary judgment must be granted, upon motion, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c). When the movant, as here, is the party with the burden of proof, summary judgment may be granted in his favor on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) where the opposing party has failed to introduce any materials in his favor, failed to point to specific areas of impeachment and contradicton, and failed to use G.S. § 1A-1, Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976); *Brooks v. Mount Airy*

Bank v. Woronoff

Rainbow Farms Center, Inc., --- N.C. App., --- , S.E.2d --- (filed 16 September 1980).

We are of the view that summary judgment was properly entered in this case. First, the record does not indicate that any doubts, other than latent doubts, have been raised as to the credibility of Jenny Brabrand, plaintiff's affiant. Defendants conducted an extensive deposition of Brabrand, in which she provided consistent testimony as to the handling of loan payment records at plaintiff bank. Second, defendants have failed to introduce any materials in their favor. Defendants rely solely on their pleadings to oppose plaintiff's motion for summary judgment, and did not file any affidavits or other materials as required by G.S. § 1A-1, Rule 56(e).

Third, defendants have not pointed to any specific areas of impeachment and contradiction. Although defendants contend that inconsistencies exist between statements made by Brabrand in her affidavit and her testimony at the deposition, we have found no such contradiction. Brabrand did not state in her affidavit, as defendants would argue, that she had personal knowledge as to the circumstances surrounding the signing of the Southern note and the transfer of consideration; she merely stated, obviously based upon her duties in handling loan documentation for plaintiff and her careful examination of plaintiff's records, that the loan "was actually made." Indeed, Brabrand made a very similar statement to that effect in her deposition.

Finally, we are convinced that no genuine issue of material fact has been raised by the materials in the record of this case. Defendants have admitted the genuineness of the Southern note and the "Unconditional Guaranty" document under which defendants guaranteed payment of the loan balances due plaintiff from Southern. Defendants have admitted that their signatures appear at the end of the guaranty document and thus their liability for the unpaid indebtedness of Southern has been established. No evidence has been offered that in any way indicates that defendants' liability on the document has been terminated. Defendants have also admitted that they have never made any payments on the note and that no payments were made on the note to the best of their knowledge. We must therefore conclude that the requirements of *Kidd v. Early*, *supra*, have been met and the decision of the trial court is affirmed.

Affirmed.

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Judges CLARK and WHICHARD concur.

STATE OF NORTH CAROLINA v. EARL LOCKLEAR

No. 8019SC634

(Filed 16 December 1980)

Rape § 19— taking indecent liberties with child — bias of mother — evidence properly excluded

In a prosecution of defendant for taking indecent liberties with a child, the trial court did not err in excluding testimony by defendant, his wife, and an employee of the county department of social services which was offered to show bias, interest, corruption, undue prejudice and influence on the part of the mother of the prosecuting witness, since the competency of the ten year old victim was determined by the trial judge after a voir dire hearing; her credibility was tested by careful cross-examination by defendant; defendant was unable to show on cross-examination that the prosecuting witness was biased or prejudiced against him or that her testimony was in any way influenced by her mother; and defendant offered his and his wife's testimony that the mother was biased before the mother testified so that such testimony at that time was irrelevant and was properly excluded by the court.

APPEAL by defendant from *Albright, Judge*. Judgment entered 18 January 1980 in Superior Court, ROWAN County. Heard in the Court of Appeals 11 November 1980.

Defendant was charged under proper indictment with taking indecent liberties with a child, a violation of G.S. § 14-202.1. The jury found defendant guilty as charged, and from a judgment imposing a prison sentence of "not less than seven (7) years nor more than ten (10) years," defendant appealed.

Attorney General Edmisten, By Assistant Attorney General George W. Lennon, for the State.

Gray and Whitley, by J. Stephen Gray, for the defendant appellant.

HEDRICK, Judge.

Notice of appeal was given in this case on 22 January 1980. The parties stipulated as to the record on appeal on 19 June 1980. The clerk of Superior Court certified the record on 26 June 1980, and the record was filed in the Court of Appeals on 30 June 1980, more than 150 days from the date of giving notice of appeal, and thus in violation of Rule 12(a) of the Rules of Appellate Procedure. The time within which to file the record on appeal with this Court was not extended by this

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Court, and this case is therefore subject to dismissal. Rule 27(c), N. C. Rules of Appellate Procedure; *C. C. Woods Construction Co., Inc. v. Budd-Piper Roofing Company*, 46 N.C. App. 634, 265 S.E.2d 506 (1980).

We have elected, however, to treat defendant's appeal as a petition for a writ of certiorari, and we allow same in order to discuss defendant's third assignment of error, which is set out in the record as follows:

That the court committed prejudicial error and sustained various objections by the State, as to questions which would show bias, interest, corruption, undue prejudice and influence, on the part of the mother of the prosecuting witness, when said evidence was competent not to prove the truth of the matter asserted in the questions, but was competent to be received for the above-mentioned purposes

At trial, the prosecuting witness, a ten year old twin, testified that defendant sexually abused her on 17 December 1977. She testified that she was spending the night of 17 December 1977 with defendant and his wife (the prosecuting witness's older sister), when the following occurred:

[Defendant] came in late after she had been asleep for a little while and woke her up by shaking her. That when she woke, up, she smelled beer on [defendant], and he took her into the kitchen. That while in the kitchen, [defendant] messed with her privacy, . . .

The prosecuting witness also testified to being forced to perform fellatio with defendant. Officer G. L. Brady testified in corroboration as to what the prosecuting witness had told him about what occurred on 17 December 1977.

Defendant testified and denied having molested the prosecuting witness at any time. His wife, called as a witness by defendant, was not permitted to testify that when she and defendant met, her mother, also the mother of the prosecuting witness, was dating defendant, nor was defendant allowed to testify that the mother "was going to pay me back one way or ther other because her baby daughter is my daughter too." Defendant also called as a witness Don Dunson of the Rowan County Department of Social Services who was not allowed over the

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State's objection to testify before the jury that an investigation had been made by the Department into alleged child abuse on the part of the mother of the prosecuting witness, and that the Department took legal custody of the prosecuting witness and her twin sister for several weeks following 21 July 1977.

After defendant, defendant's wife, and Dunson testified, defendant called the mother of the prosecuting witness, and was allowed to examine her as a "hostile witness." The mother denied having "any sort of dating relationship" with defendant, and also denied "ever going out with him socially." She did testify that on 19 December 1977, as she was getting the prosecuting witness and her twin sister ready for bed, she noticed that the prosecuting witness was "bleeding 'down below'," and when asked what happened, the prosecuting witness "said nothing." The next morning as the twins were waiting for their school bus, according to the mother's testimony, "one of them told the other one that they had better tell." Thereafter, the mother stated she called the sheriff's department, and a neighbor took her and the prosecuting witness to the hospital. The mother was not allowed to respond over the State's objection to several questions as to whether she recalled July, 1977 and if the twins always had been in her custody (apparently in reference to the child abuse investigation by the Department of Social Services).

Exceptions to the refusal of the court to allow certain testimony by defendant, defendant's wife, Dunson, and the mother of the prosecuting witness are the basis of defendant's third assignment of error.

Defendant argues that the excluded testimony upon which this assignment of error is based would have shown that there was a "considerable amount of animosity" between defendant and the mother of the prosecuting witness, and that the mother of the prosecuting witness had a "motive to harm" defendant. The excluded testimony would further have shown, defendant contends, that the mother of the prosecuting witness had beaten her children in the past, leading to an investigation of child abuse by the Rowan County Department of Social Services. Therefore, defendant argues, based upon the mother's "inclination to harm defendant in any way she could" and the child's fear of more beatings from her mother, the mother unduly influenced the prosecuting witness to testify against defendant. In effect, defendant is contending that the alleged bias of the mother toward defendant should be imputed to the prosecuting

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witness, thus calling into question the credibility of the prosecuting witness.

Defendant has cited no authority in support of this contention. Defendant does cite the cases of *State v. Creech*, 229 N.C. 662, 51 S.E.2d 348 (1949) and *State v. Smith*, 225 N.C. 78, 33 S.E.2d 472 (1945), which stand simply for the proposition that evidence of ill will of a defendant toward the victim is competent. *State v. Wilson*, 269 N.C. 297, 152 S.E.2d 223 (1967) stands for the proposition that a defendant is entitled to show the bias of a prosecuting witness toward defendant in order to attack the credibility of the prosecuting witness. In the present case, the competency of a ten year old twin was determined by careful cross-examination by defendant. Indeed, defendant was unable to show on cross-examination that the prosecuting witness was biased or prejudiced against him or that her testimony was in any way influenced by her mother. We hold the trial judge did not err in excluding the testimony challenged by these exceptions.

Although the defendant does not specifically argue the question, we consider it important to discuss whether the court committed prejudicial error in not allowing defendant and defendant's wife to testify as to facts tending to show the possible bias of the mother toward defendant. 1 Stansbury's N.C. Evidence § 48 (Brandis rev. 1973) discusses the introduction of evidence tending to show bias or interest of a witness as follows:

Where the matter inquired about is "collateral," but tends "to connect him directly with the cause or the parties" or "to show motive, temper, disposition, conduct, or interest of the witness toward the cause of the parties," the inquirer is not bound by the answers of the witness and may prove the matter by other witnesses, but only after first calling it to the attention of the witness so that he may have an opportunity to admit, deny, or explain it. [Footnotes omitted]

Id. at 136-137. Obviously, since a witness who has yet to testify has not had any "opportunity to admit, deny, or explain it," the trial judge commits no error when he excludes evidence tending to show bias toward the cause or the parties on the part of a witness who has yet to testify. *State v. Pearson*, 24 N.C. App. 410, 210 S.E.2d 887, *affirmed*, 288 N.C. 34, 215 S.E.2d 598 (1975).

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In the present case, when defendant offered his testimony and his wife's testimony that the mother was biased or prejudiced against defendant, the mother had not testified. Such testimony at that time was obviously irrelevant, and the witness had not had any opportunity to "admit, deny, or explain it." When the mother did testify, she denied "any sort of dating relationship" with defendant. Thereafter, defendant offered no evidence to attack her credibility as he might have done. Finally, we note that defendant attempted to bring out evidence as to the child abuse investigation during the mother's testimony, but this evidence clearly does not go to show any possible bias of the mother toward defendant, and is otherwise irrelevant to whether defendant committed the crime with which he was charged. Defendant's third assignment of error has no merit.

We have examined defendant's two additional assignments of error and find them to be without merit.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and WHICHARD concur.

STATE OF NORTH CAROLINA v. DONALD RAY POLLOCK

No. 807SC600

(Filed 16 December 1980)

1. Criminal Law § 101.1— statement by rejected juror — accepted juror not prejudiced — denial of mistrial proper

The trial court did not err in failing to declare a mistrial during the jury selection process because of a statement made during a recess by a rejected juror in the presence of jurors who had been accepted, since only one juror heard the statement; defendant and his counsel stated that they did not want the juror removed; the court inquired of the remaining eleven jurors if any of them heard the statement and they indicated that none of them heard it; the court carefully examined the juror who heard the statement as to whether it would in any way influence his verdict in the case; and the court offered defendant's counsel an opportunity to examine the jury further with respect to the statement, but counsel stated they were content with the original twelve jurors.

2. Criminal Law § 89.3— corroborating testimony admissible

The trial court in an incest prosecution did not err in permitting repeated testimony by other witnesses of statements allegedly made to them by the prosecuting witness regarding defendant's acts toward her.

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3. Incest § 1; Criminal Law § 117.2— victim of incest — instruction to view testimony with caution not required

The trial court in an incest prosecution was not required to instruct the jury that they should “view the testimony of the prosecuting witness with caution because one can never be sure what part psychological factors play in the testimony of a child against their parent.”

APPEAL by defendant from *Peel, Judge*. Judgment entered 29 January 1980 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 5 November 1980.

Defendant was tried upon an indictment charging him with incest, convicted by jury, and sentenced to imprisonment. From this judgment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Philips, Bourne, Harper & Keel, by Jimmie R. Keel, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant first contends the trial court should have declared a mistrial during the selection of the jury. After twelve jurors had been selected, the court was in the process of choosing a thirteenth or alternate juror. During a recess of the court, one of the twelve selected jurors and several other persons were in a room where soft drink machines evidently were located. A juror who had been rejected made the statement: “Well, if he would do that to his own daughter he would do it to somebody else’s daughter.” Juror No. 12, Audrew Harrell, was the only one of the twelve selected jurors who heard the statement.

Judge Peel inquired whether defendant or his counsel wanted juror Harrell removed from the case, and counsel, after conferring with defendant, stated that they did not want juror Harrell removed. The court offered to excuse the juror on its own motion if counsel for defendant so desired. Again, defendant’s counsel stated they accepted juror Harrell. The court also inquired of the remaining eleven jurors if any of them heard the statement and they indicated that none of them heard it. It is not required that the court question each juror individually under these circumstances. *State v. McGuire*, 297 N.C. 69, 254 S.E.2d 165, cert. denied, 444 U.S. 943 (1979). The court carefully examined juror Harrell as to whether the statement would in any way

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influence his verdict in the case, and he positively stated that it would not. The court offered defendant's counsel an opportunity to examine the jury further with respect to the statement, but counsel stated they were content with the original twelve jurors. The court entered an order finding facts and denying defendant's motion for a mistrial. Defendant did not object or except to any of the court's findings of fact.

When the court became aware of the statement made in the presence of the juror, it had the duty to determine whether substantial or irreparable prejudice to defendant resulted. *See* N.C. Gen. Stat. 15A-1061. The uncontradicted evidence shows that the remark did not prejudice or affect in any way juror Harrell. He was the only one of the twelve selected jurors who heard the remark. There are no exceptions to the court's findings of fact. They are deemed to be supported (and are in fact supported) by substantial competent evidence and are conclusive upon appeal. *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977); *Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962); *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E.2d 494 (1979). The record does not disclose any abuse of discretion by Judge Peel in denying defendant's motion. To the contrary, he made every effort to ensure the integrity of defendant's trial and gave him every opportunity to satisfy himself as to the jury. The assignment of error is overruled.

[2] Defendant argues the court erred in allowing witnesses to corroborate the prosecuting witness's testimony "beyond a reasonable measure." Defendant objects to repeated testimony by other witnesses of statements made to them by the prosecuting witness regarding defendant's acts toward her. The trial judge has wide discretion in allowing corroborative testimony. *Gibson v. Whitton*, 239 N.C. 11, 79 S.E.2d 196 (1953); 1 Stansbury's N.C. Evidence §§ 51-52 (Brandis rev. 1973). No abuse of discretion appears in the record. This case depended in a large measure upon the credibility of the seventeen-year-old prosecuting witness. The court properly instructed the jury concerning their consideration of the corroborative evidence. We find no error in allowing the corroborative evidence.

[3] Defendant's counsel requested the following instruction:

I direct you, ladies and gentlemen of the jury to view the testimony of the prosecuting witness, Brenda Pollock, with caution because one can never be sure what part psychological factors play in the testimony of a child against their

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parent.

Defendant concedes that the testimony of a prosecutrix in an incest case need not be corroborated. *State v. Wood*, 235 N.C. 636, 70 S.E.2d 665 (1952). Nevertheless, defendant urges that the jury should have been cautioned that the testimony of an adolescent daughter against her father is inherently suspect. Defendant relies upon a statement in 41 Am. Jur. 2d Incest § 13, 520 (1968), which cites as authority *People v. Covert*, 249 Cal. App. 2d 81, 57 Cal. Rptr. 220 (1967).¹ The issue of the necessity of a cautionary instruction was not before the court in *Covert*, but the portion of that court's opinion on which the present defendant relies cited as authority *People v. Nye*, 38 Cal. 2d 34, 237 P.2d 1 (1951). The pertinent portion of *Nye*, in turn, was overruled in *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 92 A.L.R.3d 845 (1975). That court held: "Since it does not in fact appear that the accused perpetrators of sex offenses . . . are subject to capricious conviction by inflamed tribunals of justice, we conclude that the requirement of a cautionary instruction in all such cases is a rule without a reason." *Id.* at 882, 538 P.2d at 259.

We have been unable to find any North Carolina cases mandating an instruction such as that requested by defendant. In *State v. Hardee*, 6 N.C. App. 147, 169 S.E.2d 533 (1969), an incest prosecution, this Court held that it is permissible to instruct on the credibility of witnesses, but that failure to do so is not the proper subject of exception. In another incest case, *State v. Sauls*, 190 N.C. 810, 130 S.E. 848 (1925), the jury was instructed to scrutinize the testimony of the defendant and his close relatives before accepting their testimony as true. The defendant excepted to the instruction because it was not extended and applied to all interested witnesses. The Court overruled the exception because such an instruction is a subordinate, not a substantive, feature of the trial. Although in both *Hardee* and *Sauls* there was no request for a cautionary instruction, as there was in the present case, we cannot conclude that failure to submit the instruction was prejudicial error. Judge Peel did instruct the jury that it could consider the interest of a witness in determining whether to believe that witness. We do not find defendant's authority persuasive and find no error in the refusal by the court to so instruct the jury.

¹ *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433 (1978), overruled the relevant portion of *Covert*. *Thomas* held that evidence for corroborative purposes of prior sex offenses by a defendant, which involved victims other than the prosecuting witness, would no longer be allowed without regard to remoteness or similarity of the offense.

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Last, defendant urges that the court should have allowed his motions for dismissal at the close of all the evidence and to set aside the verdict as being against the weight of the evidence. Without reciting the sordid facts of this case, we nevertheless find there was substantial competent evidence to require the case be submitted to the twelve and to support the verdict. On behalf of defendant, the jurors were polled and reaffirmed their verdict. We also find the evidence when considered on these motions complies with the standards of *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, rehearing denied, 62 L. Ed. 2d 126 (1979).

The statement of Justice Ervin in *State v. Wood*, *supra* at 638, 70 S.E.2d at 667, is also fitting in this case:

According to the verdict of the jury, the defendant has sinned grievously against his . . . child. This tragic case calls to mind the execration of the Man of Galilee. "It were better for him that a millstone were hanged about his neck, and he were [*sic*] cast into the sea, than that he should offend one of these little ones." Luke 17:2

No error.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. WILTON EARL ALLEN

No. 8011SC618

(Filed 16 December 1980)

1. Rape § 4.1—evidence of prior sexual advances by defendant — admissibility

In a prosecution of defendant for rape of his fifteen year old daughter and for incest, the trial court did not err in permitting the prosecuting witness to testify regarding prior sexual advances and physical abuses by defendant, since such evidence was admissible to show the intent and design of defendant to commit the offenses with which he was charged.

2. Rape § 4— expert medical witness — opinion evidence admissible

The trial court in a rape prosecution did not err in permitting an expert witness to express an opinion that a woman could be raped without there being evidence of trauma about the vulva or vaginal areas, since defendant had stipulated that the witness was an expert in the field of obstetrics and gynecology, and the witness testified extensively as to his examination of the prosecuting witness, from which it was clear that he had more than adequate understanding of the medical results of incidents such as rape.

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3. Criminal Law § 98.1— outburst by prosecuting witness — motion for mistrial properly denied

In a prosecution for rape and incest, the trial judge did not abuse his discretion in denying defendant's motion for a mistrial because the prosecuting witness shouted out on two occasions that defendant's mother, who testified in his behalf, was lying.

4. Criminal Law § 111.1— reading indictment to jury — no error

Reading a portion of the bill of indictment solely as part of the jury charge is not a violation of G.S. 15A-1213.

5. Incest § 1; Rape § 1— incest with and rape of daughter — one transaction —two separate crimes

Defendant could properly be charged with incest and second degree rape, though the two offenses arose out of the same transaction and were based on the same facts, since the two offenses were separate and distinct and involved different elements.

APPEAL by defendant from *Lee, Judge*. Judgment entered 21 November 1979 in Superior Court, JOHNSTON County. Heard in the Court of Appeals on 6 November 1980.

Defendant was charged in proper indictments with second degree rape of his fifteen year old daughter and with incest. Defendant pleaded not guilty to both offenses. The assignments of error brought forward and argued in defendant's brief make it unnecessary for us to recite the evidence in more detail than is done in the opinion following.

The jury found defendant guilty as charged and from a judgment sentencing defendant to imprisonment for "the term of twenty-five (25) years maximum" on the charge of second degree rape and for "the term of ten (10) years minimum, ten (10) years maximum" on the charge of incest, the sentences to run concurrently, defendant appealed.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, and Associate Attorney Jane P. Gray, for the State.

Narron and O'Hale, by John P. O'Hale, for the defendant appellant.

HEDRICK, Judge.

[1] Based upon his second assignment of error, defendant contends that the court erred in permitting the prosecuting witness to testify regarding prior sexual advances and physical abuses by defendant. Defendant argues that this evidence was "inadmissible under the recognized rules of evidence" and "highly prejudicial to the defendant." We disagree. It is well-established in this State that when the

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defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. 1 Stansbury, N.C. Evidence, § 91 (Brandis rev. 1973); *State v. Jones*, 299 N.C. 298, 261 S.E.2d 860 (1980); *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954). Such evidence will be admissible, however, if that evidence is used to show intent, design, guilty knowledge, or scienter or to make out the res gestae or to exhibit a chain of circumstances in respect of the matter on trial, when the other offenses are so connected with the offense charged to throw light on one or more of these questions. *State v. Lowery*, 286 N.C. 698, 213 S.E.2d 255 (1975); *State v. Arnold*, 284 N.C. 41, 199 S.E.2d 423 (1973). In sexual offense cases, moreover, the North Carolina courts have been very liberal in admitting evidence of similar sexual offenses. *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978); *State v. Gainey*, 32 N.C. App. 682, 233 S.E.2d 671 (1977). In the present case, the prosecuting witness testified that on several occasions prior to the incident in question, defendant "would turn around and try to kiss me in the mouth, and then he kept on doing it until I just got to where I wouldn't hardly ever kiss him anymore, or try to, or anything." She also testified that on one other occasion defendant "pulled me across the bed and was trying to kiss me, . . ." and that defendant had beaten her several times. In our view, this testimony sheds light on the intent and design of defendant to commit the offenses with which he was charged, and thus the court properly admitted that testimony. This assignment of error is without merit.

[2] Defendant's third assignment of error relates to the court's permitting an expert witness "to express an opinion that a woman could be raped without there being evidence of trauma about the vulva or vaginal areas." Defendant contends that "no factual basis or premise for the physician's opinion was presented to the jury for their evaluation, other than the fact that Doctor Woodall had been a physician since 1956." We do not agree. Expressions of opinion by an expert witness must be based either upon facts within the personal knowledge of the expert witness, or upon an assumed state of facts supported by evidence and recited in a hypothetical question. *Taylor v. Boger*, 289 N.C. 560, 223 S.E.2d 350 (1976); *Dean v. Carolina Coach Co., Inc.*, 287 N.C. 515, 215 S.E.2d 89 (1975); *Tucker v. Blackburn*, 28 N.C. App. 455, 221 S.E.2d 755 (1976). In the present case, the challenged opinion of the physician was obviously based upon facts within his personal knowledge. Defendant stipulated that Doctor Woodall was

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an expert in the field of obstetrics and gynecology, and Doctor Woodall testified extensively as to his examination of the prosecuting witness, from which it is clear to us that Doctor Woodall has a more than adequate understanding of the medical results of incidents such as rape. This assignment of error is without merit.

[3] While the mother of defendant was testifying in his behalf that she had never seen defendant strike his daughter, the prosecuting witness shouted out from the audience section of the courtroom on two separate occasions that defendant's mother "was lying." The trial judge had the prosecuting witness brought before the bench and in the absence of the jury, counsel for defendant moved that the court "declare a mistrial for this outburst." The trial judge denied the motion, which is the basis for defendant's fifth assignment of error. G.S. § 15A-1061 in pertinent part provides:

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case . . .

A motion for mistrial in a non-capital case is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion. *State v. Bumgarner*, 299 N.C. 113, 261 S.E.2d 105 (1980); *State v. Mills*, 39 N.C. App. 47, 249 S.E.2d 446 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). Clearly, the trial judge's denial of defendant's motion did not amount to an abuse of his discretion, and defendant did not suffer "substantial and irreparable prejudice" as a result. As Judge Vaughn stated for this Court in *State v. Dais*, 22 N.C. App. 379, 206 S.E.2d 759, *cert. denied*, 285 N.C. 664, 207 S.E.2d 758 (1974): "Not every disruptive event occurring during the course of the trial requires the court automatically to declare a mistrial." *Id.* at 384, 206 S.E.2d at 762. This assignment of error is without merit.

[4] Based on his sixth assignment of error, defendant contends the court erred in "reading the bills of indictment to the jury." We disagree. G.S. § 15A-1213 provides:

Prior to selection of jurors, the judge must identify the

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parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense by which the defendant has given pre-trial notice as required by Article 52, Motions Practice. The Judge may not read the pleadings to the Jury.

Although reading the bill of indictment to the jury at both the beginning of the trial and in the charge to the jury has been held to be a violation of G.S. § 15A-1213 and prejudicial error, *State v. Hill*, 45 N.C. App. 136, 263 S.C.2d 14 (1980), reading a portion of the bill of indictment solely as part of the jury charge has not been held to be a violation of the statute, the reasoning being that the purpose of G.S. § 15A-1213 is to prevent giving jurors a "distorted view" of the case through the "stilted language" of indictments, and that such purpose is not served by finding a violation after the jurors have heard all the evidence. *State v. Laughinghouse*, 39 N.C. App. 655, 251 S.E.2d 667, cert. denied and appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979). In the instant case, the trial judge read the bills of indictment to the jury as part of his charge, but did not, as defendant concedes and the record indicates, read the bills to the jury at any prior point in the proceedings. Our decision in this case is controlled by *State v. Laughinghouse*, *supra*, and thus defendant's sixth assignment of error is meritless.

[5] Defendant lastly contends, based upon his seventh assignment of error, that the offenses with which he was convicted, incest and second degree rape, are not separate offenses, and since the charges against him arose out of the same transaction and are based on the same facts, the court erred in sentencing defendant on the incest conviction. We disagree. In *State v. Harvell*, 45 N.C. App. 243, 262 S.E.2d 850 (1980), the defendant argued that the court erred in refusing to merge charges against him for second degree rape and incest. This Court stated, per Judge Robert M. Martin:

Rape requires force, incest does not. Incest requires kinship, rape does not. Obviously, they are different offenses. They have different elements and are therefore distinct offenses even though one crime was committed during the perpetration of another. [Citation omitted.]

Id. at 248, 262 S.E.2d at 853. We find this reasoning eminently sound

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and controlling in the present case. This assignment of error is without merit.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and WHICHARD concur.

PAUL CLIFTON AND WIFE, RACHEL CLIFTON v. BILL C. FESPERMAN AND WIFE, NAN P. FESPERMAN

No. 804SC428

(Filed 16 December 1980)

Easements § 6.1— prescriptive easement claimed — failure to show use other than by permission

The trial court properly entered summary judgment for defendants on plaintiffs' claim of a prescriptive easement where plaintiffs rested on stipulations and offered no evidence that their use of the way across defendants' property was other than by permission, and plaintiffs therefore failed to demonstrate that their use was adverse to defendants' interests, an essential element of a prescriptive easement.

APPEAL by plaintiffs from *Britt (Samuel E.)*, Judge. Judgment entered 26 November 1979 in Superior Court, DUPLIN County. Heard in the Court of Appeals 17 October 1980.

This is a civil action in which plaintiffs seek a declaration of easement across lands of defendants and "[t]hat the cloud of said quitclaim deed [to defendants from a third party] be removed from the easement of the plaintiffs"

The action arose as a result of defendant's refusal to allow access to plaintiffs' property across property owned by defendants. Plaintiffs allege they acquired a prescriptive easement in the right-of-way through continuous use dating back to 1944. Defendants denied that plaintiffs had acquired an easement over defendants' property.

The parties stipulated to the following for purposes of the hearing on defendants' motion for summary judgment:

3. That Paul Clifton and wife, Rachel Clifton, the plaintiffs are the record title owners of the tract of land described in Paragraph Three of Plaintiffs' Complaint, and that said

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property was deeded to the plaintiffs by Commissioners Deed on December 20, 1962, said deed conveying the interest of the heirs of the deceased Cora K. Clifton, to the plaintiffs, and that these lands are the same lands conveyed by A. L. Mansfield and wife, Ada C. Mansfield to Mrs. Cora K. Clifton and Jewel Clifton by deed dated February 12, 1944, and duly recorded in Book 425, page 465 of the Duplin County Public Registry.

4. That Cora K. Clifton died intestate on May 8, 1962.

5. That the tract of land described in Paragraph Five of Plaintiffs' Complaint is not included in the description of the land owned by the Plaintiffs in fee simple as described in Paragraph Three of said Complaint, and that the plaintiffs in their complaint claimed that they have used as means of ingress, egress and regress this certain strip of land lying on the eastern side of plaintiffs' property, and that said use has been open, notorious and continuous since February 12, 1944, and has been under known and visible boundaries, and has prayed the Court that plaintiffs be declared the owners in an easement to said strip of land described in Paragraph Five of the Complaint.

6. That said ten (10) foot strip of land described in Paragraph Five of Plaintiffs' Complaint is land that has not been described, within the description of the tract of land which plaintiffs claim they own in fee simple and that said ten (10) foot strip is beyond the proper boundaries of the description set forth in Paragraph Three of Plaintiffs' Complaint.

7. That on March 15, 1977, Ada C. Mansfield, the surviving spouse of A. L. Mansfield, by Quitclaim Deed recorded in Book 820, page 811 of the Duplin County Public Registry, conveyed to the defendants the strip of land described in Paragraph Five of the Plaintiffs' Complaint, and that Ada C. Mansfield was the owner of the record title of said strip of land.

8. That plaintiffs caused the above action to be filed on the 30th day of June, 1977, and that at the time this action was filed, the heirs of Cora K. Clifton, had not by deed or

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otherwise conveyed any interest they may have had in said ten (10) foot strip of land to the plaintiffs, and that pursuant to Motion by the plaintiffs' attorney, Miles B. Fowler, before the Honorable James D. Llewellyn on the 24th day of September, 1979, leave was given to the plaintiffs to file an Amended or Supplemental pleading within ten (10) days and that the heirs of Cora K. Clifton have now since the institution of this action, conveyed any interest they may have had in said strip of land to the plaintiffs.

9. That one of the plaintiffs, Paul Clifton, is an heir of the deceased, Cora K. Clifton, being a surviving son, and that he would have owned an undivided interest in the aforementioned described tract of land described in Paragraph Three of Plaintiffs' Complaint, upon her death on May 8, 1962.

10. That the defendants are the owners in fee simple of that certain tract of land lying to the South and being contiguous to the aforementioned ten (10) foot strip described in Paragraph Five of Plaintiffs' Complaint, and that the defendants are claiming title to said strip of land by virtue of a deed dated March 15, 1977, received from Ada C. Mansfield, and then recorded in Book 820, page 811 of the Duplin County Public Registry.

Plaintiffs appeal from the grant of summary judgment for defendants.

Warren & Fowler, by Miles B. Fowler, for plaintiff appellants.

No brief filed by defendants.

ARNOLD, Judge.

Plaintiffs contend that the trial judge misinterpreted the law in granting defendants' motion for summary judgment. While the trial judge inadvisedly made extensive findings of fact and conclusions of law in ruling on defendants' motion, they are disregarded on appeal. W. Shuford, N.C. Civil Practice and Procedure § 56.6 (1980 Supp.); *see, Lee v. King*, 23 N.C. App. 640, 209 S.E.2d 831, *cert. denied*, 286 N.C. 336, 211 S.E. 2d 213 (1974).

We find that the trial judge properly granted summary judgment for defendants. In North Carolina, use of a way over another's land is

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presumed permissive or with the owner's consent unless the contrary is shown by competent evidence. *Watkins v. Smith*, 40 N.C. App. 506, 253 S.E. 2d 354 (1979). Plaintiffs chose to rest on the stipulations, offering no evidence, through affidavits or otherwise, that their use of the way across defendants' property was other than by permission. Therefore, plaintiffs have failed to demonstrate that their use was adverse to defendants' interests, an essential element of a prescriptive easement, especially in light of the presumption that their use was permissive. *Id.*

Where a defendant seeking summary judgment carries his burden of proving a lack of genuine issue of fact for trial by evidentiary presumption or otherwise, the plaintiff may not rely on his bare allegations to the contrary but must, by affidavits or otherwise, set forth specific facts showing a genuine issue of fact for trial to defeat defendants' motion. *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 873 (1973). Plaintiffs failed to offer evidence to rebut the presumption of permissive use and therefore are subject to defendants' motion for summary judgment.

The ruling of the trial judge allowing defendants' motion for summary judgment is

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. WILLIAM R. ELLIS, JR.

No. 808SC504

(Filed 16 December 1980)

1. Constitutional Law § 67— identity of informant — questions not permitted — no error

The trial court did not err in refusing to allow defendant, who was charged with possession of marijuana and methaqualone, to ask questions concerning the identity of a confidential informant whose tip led to defendant's arrest where an officer's testimony that he listened to telephone conversations between the informant and another officer provided sufficient corroboration of the informant's existence independent of the testimony in question. G.S. 15A-978(b)(2).

2. Searches and Seizures § 11— warrantless search of vehicle — no unconstitutional search

There was no merit to defendant's contention that a warrantless search of his

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vehicle was unconstitutional since, prior to the search, the officers corroborated an informant's tip to the last detail through their own observations, and one of the officers testified that the confidential informant was known to him and had proven reliable on prior occasions with information concerning drug distribution.

APPEAL by defendant from *Peel, Judge*. Judgment entered 11 February 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 10 October 1980.

Defendant was indicted on the charges of possession of greater than one ounce of marijuana with the intent to manufacture, sell and deliver, possession of methaqualone - a Schedule II substance, and keeping and maintaining a motor vehicle for use in the distribution of controlled substances. Defendant's motion to suppress the evidence found pursuant to a warrantless search of his vehicle was denied prior to trial. Thereafter, defendant pled guilty, as a result of a plea bargain with the district attorney, to felony possession of marijuana with the intent to sell and maintaining a motor vehicle for purposes of selling controlled substances. Defendant was sentenced to seven years in prison.

At the hearing on defendant's motion to suppress, evidence was presented that William C. Goodman, Jr., a Wayne County deputy sheriff, received a tip from a confidential informant that defendant Ellis was distributing drugs at Charles B. Aycock school. Deputy Goodman testified that the informant was known to him and had proven reliable in the past in similar situations involving drug distribution. The informant, according to Officer Goodman stated that the defendant had been selling drugs at the school for some time. A subsequent call from the informant to Deputy Goodman, to which Deputy Odom listened, established that defendant would arrive at the school between 7:45 and 8:00 a.m. driving a red and white Ford pickup truck with a camper on the back, and have in his possession one pound of marijuana concealed in a green ammunition can under the seat of the truck. The officer testified that when he and three other deputies approached defendant at the school, he saw a cigar box lying on the front seat of the truck, a green ammunition can on the floor and a plastic bag on the dash. The officers arrested the defendant and seized the containers which held marijuana and methaqualone.

Defendant appeals from the judge's denial of his motion to suppress the evidence found in the truck and the signing and entry of the judgment based on defendant's guilty plea.

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Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Hulse & Hulse, by Donald M. Wright, for defendant appellant.

ARNOLD, Judge.

[1] This case presents the recurrent question of whether the court erred in refusing to allow defendant to ask questions concerning the identity of the informant. Defendant's position is that G.S. 15A-978(b) entitled him to this information. We conclude differently, however.

As stated in *State v. Ketchie*, 286 N.C. 387, at 392-393, 211 S.E. 2d 207 at 211 (1975), "Defendant has made no defense on the merits and does not contend that the informant participated in or witnessed the alleged crime. Therefore, he has no constitutional right to discover the name of the informant. (Citations omitted.) As stated by the Court in *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 63 (1967): 'Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury.' "

While G.S. 15A-978 (b) requires disclosure of an informant's identity in some situations, this case falls under exception number two provided in the statute: "(2) There is corroboration of the informant's existence independent of the testimony in question." Deputy Odom testified that he listened to both telephone conversations between the informant and Officer Goodman. This was sufficient corroboration of Deputy Goodman's testimony relating to the informant. See, *State v. Collins*, 44 N.C. App. 141, 260 S.E. 2d 650, *aff'd* 300 N.C. 142, 265 S.E. 2d 172 (1980); *State v. Bunn*, 36 N.C. App. 114, 243 S.E. 2d 189, *cert. denied* 295 N.C. 261, 245 S.E. 2d 778 (1978).

[2] Defendant also argues that the court should have allowed his motion to suppress articles obtained in the search of the car, vigorously contending that the warrantless search of the vehicle was unconstitutional. We disagree.

The warrantless search of defendant's vehicle was lawful and falls within the decision of this Court in *State v. Tickle*, 37 N.C. App. 416, 246 S.E. 2d 34 (1978), and our Supreme Court, in *State v. Ketchie*, *supra*. "The warrantless arrest, search and seizure [are] . . . lawful" even though the informant does not provide the underlying circumstances sufficient to constitute probable cause upon which to issue a

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search warrant. *State v. Ketchie, supra*, at 392, 211 S.E. 2d at 211. “[P]robable cause to arrest and search defendant existed on the basis of the minute particularity with which the informant described defendant and the physical and independent verification of this description” by the officer. *Id.* at 393, 211 S.E. 2d at 211.

Prior to the search, in the case *sub judice*, the officers corroborated the informant’s tip to the last detail through their observation of the following: (1) defendant arrived at Charles B. Aycock school between 7:45 and 8:00 a.m., (2) defendant was driving a red and white Ford pickup truck with a camper on the back, license number AJ-9936, (3) defendant, who was known to the officers, matched the informant’s description and was the registered owner of the vehicle with the license number supplied by the informant. Deputy Goodman testified at the hearing that the confidential informant was known to him and had proven reliable on prior occasions with information concerning drug distribution. Together, all these factors establish that the officers had probable cause to arrest defendant and search his vehicle. The judge’s ruling on defendant’s motion to suppress is upheld.

Defendant’s motions were properly denied and judgment lawfully entered upon defendant’s plea of guilty.

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. CHARLES FRANKLIN McCULLOUGH

No. 8025SC567

(Filed 16 December 1980)

1. Constitutional Law § 30— trial involving other defendants — motion for free transcript properly denied

The trial court did not err in denying defendant’s motion for a free transcript of a previous and separate trial in which two men arrested with him and tried on the same charges were acquitted by a jury, since there was no compelling evidence of the need for the transcript and no showing that no alternative means existed for obtaining such information.

2. Criminal Law § 33— third persons arrested with defendant — evidence of acquittal inadmissible

Evidence of the acquittal of third persons arrested with defendant for the

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crimes charged was not relevant evidence at defendant's trial.

3. Criminal Law § 66.9— identification of defendant from photographic display — no impermissibly suggestive procedure

In a prosecution of defendant for uttering a forged check, the trial court properly admitted a bank teller's identification of defendant from a photographic display, since the procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification; at the time of the crimes defendant was within arm's length of the teller; the teller recognized defendant from his prior visits to the bank; and she picked defendant and another man out of eight photographs presented to her by the police officer and testified that the officer's comments following her identification had no effect on the identification.

APPEAL by defendant from *Jolly, Judge*. Judgment entered 30 January 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 October 1980.

Defendant pled not guilty to charges of breaking and entering, larceny and uttering a forged check. The evidence at trial was undisputed that defendant at one time worked for Norris Wood Products, Inc. but was terminated prior to 8 June 1979. The evidence further showed that the office of Norris Wood Products was broken into on 8 June 1979 and that along with other articles taken from the office, several blank checks were removed from a business checkbook. The State's evidence tended to show that defendant, under the name of Jerry Lewis, cashed one of the checks taken from the Norris Wood Products office. The defendant was identified by a bank teller in a photographic display and arrested along with two other suspects. The vehicle in which defendant and the others were riding at the time of their arrest was searched pursuant to a warrant, and evidence of the crime was found.

The jury found the defendant guilty of larceny and uttering a forged check, but not guilty of breaking and entering. Defendant's motion to set aside the jury verdict as to the larceny charge was granted and defendant was sentenced to 3 to 5 years in prison for the offense of uttering a forged check, from which judgment defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Tate, Young and Morphis, by Thomas C. Morphis, for defendant appellant.

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ARNOLD, Judge.

[1] Defendant challenges the denial of his pretrial motion requesting a free transcript of a previous and separate trial in which two men arrested with him and tried on the same charges were acquitted by a jury. The defendant contends his indigency prevented him from obtaining the transcript which he argues "would have been invaluable" in his defense. Defendant cites *Britt v. North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431 (1971), and *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975), as authority for the proposition that he should have been allowed a copy of the transcript.

In neither case cited by defendant was the indigent defendant allowed a free transcript. The Court in *Britt* outlined the history of indigent defendants' rights to a transcript.

Griffin v. Illinois and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of *prior proceedings* when that transcript is needed for an effective defense or appeal. . . .

In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

(Emphasis added) 404 U.S. at 227, 30 L.Ed. 2d at 403, 404, 92 S.Ct. at 435. In denying that defendant Britt's rights were violated, the Court based the decision on the availability of an alternative to a transcript, *i.e.*, an informal request by defense counsel that the court reporter, who was a "good friend of all the local lawyers and was reporting the second trial," read back to counsel his notes of the mistrial. 404 U.S. at 229, 30 L.Ed. 2d at 405, 92 S.Ct. at 434, 435.

The Court rejected the suggestion that the defendant must make a showing of "particularized need" to be entitled to the transcript,

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stating:

We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. As Mr. Justice Douglas makes clear, even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.

404 U.S. at 228, 30 L.Ed. 2d at 404, 92 S.Ct. at 434.

McAllister involved the trial of a defendant charged with three counts of forgery and uttering a forged instrument. Two of the counts were consolidated for trial and defendant requested a free transcript of the trial on the other count which ended in nonsuit. The Supreme Court agreed that defendant was not entitled to the transcript since "the transcript requested was one of a separate and distinct proceeding rather than a prior proceeding in the present case, and defendant's attorney did not take advantage of any other formal or informal alternative methods for discovering the information sought. . . ." *State v. McAllister*, 287 N.C. at 182, 214 S.E. 2d at 80.

As in *McAllister*, defendant in this case seeks a transcript of a separate and distinct proceeding with a different jury and different defendants. Defense counsel suggested the transcript was needed to "see what worked" in the trial of other defendants who were acquitted. We see no support for defendant's contentions that denial of the transcript was a violation of due process and equal protection rights. In the absence of compelling evidence of the need for a transcript of a separate proceeding to afford defendant adequate tools for his defense, and no alternative means of obtaining such information, the State should not be required to furnish such a transcript.

[2] Defendant also assigns as error the denial of his motion to dismiss on the grounds that his co-defendants were acquitted at a separate trial, and the court's limitation of questioning directed to the co-defendants concerning the outcome of their trial. His assertions are

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untenable. Breaking and entering, larceny and uttering a forged check are offenses that require only one perpetrator. Therefore, the acquittal of third persons arrested with the accused for the crime is not relevant evidence at defendant's trial. 22A C.J.S. *Criminal Law* § 622 (1961).

[3] We also hold that the trial judge properly admitted the bank teller's identification of the defendant from a photographic display since the procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *See, State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). The witness testified that she was not wearing her glasses when the defendant was in the bank, but that he was within arm's length of her, and she recognized him from his prior visits to the bank. She picked the defendant and another man out of eight photographs presented to her by the police officer and testified that the officer's comments following her identification had no effect on the identification.

Defendant's remaining assignments of error have been carefully reviewed. We conclude that they fail to show any prejudicial error.

No error.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. CONRAD E. SMITH

No. 8012SC633

(Filed 16 December 1980)

1. Criminal Law § 76.5— motion to suppress not supported by affidavit — findings of fact not required at suppression hearing

Since defendant's affidavit failed to support his motion to suppress, the trial court properly denied the motion summarily, without making findings of fact; additionally, findings of fact are not required where there is no conflict in the evidence at the suppression hearing. G.S. 15A-977 (d) and (f).

2. Criminal Law § 146.1— issues not presented at trial — no consideration on appeal

The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal.

3. Criminal Law § 113.1— summary of evidence favorable to defendant

There was no merit to defendant's contention that the trial court totally failed

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to summarize evidence favorable to him and thereby failed to comply with G.S. 15A-1232.

APPEAL by defendant from *Lee, Judge*. Judgment entered 31 January 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 November 1980.

Defendant was charged with armed robbery. The state's evidence tends to show that about 6:00 p.m. on 27 September 1979, a man entered the offices of Coble Dairy, forced four employees into an office at gunpoint, and stole a bank bag containing about \$8,000 in cash and checks. The man was wearing a hood over his head. Witness Dorothy Autry testified that about that same time she saw a man come out of the Coble Building wearing a hood over his head. As she watched, he removed the hood. She identified defendant at trial as the man she saw leave Coble's building. A pretrial hearing was held on defendant's motion to suppress statements he made while in custody of police officers. The judge denied the motion without making findings of fact. From the verdict of guilty and judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

James R. Parish, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant argues the trial court committed reversible error by failing to find facts in its order denying defendant's motion to suppress. He relies upon N.C.G.S. 15A-977 (d) and (f). The statute requires an affidavit supporting the motion to suppress. Defendant's affidavit states that defendant was arrested without a warrant and without probable cause. The record contains the warrant issued 1 October 1979, ordering the arrest of defendant on this charge. The return of the arresting officer on the warrant shows defendant was arrested 1 October 1979. The officer testified he had the arrest warrant in his possession before and at the time he arrested defendant.

With the arrest warrant in the record before the trial court, the affidavit submitted did not, as a matter of law, support the motion to suppress. Pursuant to N.C. G.S. 15A-977 (c) (2), the trial court had the authority summarily to deny the motion. Nevertheless, he allowed

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defendant an opportunity to produce such evidence on the question as he desired. Defendant's evidence only described how he was arrested and showed that he was served with a warrant after he was at the magistrate's office. Defendant did not challenge the validity of the arrest warrant but proceeded on the premise that the arrest was made without a warrant. The evidence of defendant at the suppression hearing did not contradict the state's evidence.

As defendant's affidavit failed to support the motion to suppress, the court properly denied the motion summarily, without making findings of fact. Additionally, findings of fact are not required where there is no conflict in the evidence at the suppression hearing. *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978); *State v. Thacker*, 45 N.C. App. 102, 262 S.E.2d 305 (1980). The assignment of error is without merit.

[2] Next, defendant attempts to attack the arrest warrant in the appellate court. Defendant did not challenge the arrest warrant in the trial court. The record on appeal does not contain any exception or assignment of error as to the validity of the arrest warrant. The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal. *State v. Wilson*, 237 N.C. 746, 75 S.E.2d 924 (1953); *State v. Brown*, 33 N.C. App. 84, 234 S.E.2d 32, *disc. rev. denied*, 292 N.C. 731 (1977), *cert. denied*, 296 N.C. 106 (1978). Further, the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. Rule 10 (a), N.C.R. App. Proc.; *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976); *State v. Brothers*, 33 N.C. App. 233, 234 S.E.2d 652, *disc. rev. denied*, 293 N.C. 160 (1977).

[3] Last, defendant contends the trial judge erred by failing to comply with N.C.G.S. 15A-1232. Defendant argues the court totally failed to summarize evidence favorable to him. The statute requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. If the court recapitulates fully the evidence of the state but fails to summarize, at all, evidence favorable to defendant, he violates the clear mandate of the statute. *State v. Sanders*, 298 N.C. 512, 259 S.E.2d 258 (1979).

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set it out in his recapitulation of the evidence. The following portions of the summary of the evidence are favorable to defendant:

That none of the four men present, that is, Beasley, Monterio, Goodman, or McClennihan could identify the individual who came in wearing a hood and carrying a gun.

. . . [T]hat the man [Dorothy Autry] saw was the defendant Conrad E. Smith but that she later picked out a picture of someone other than the defendant from a photographic lineup.

. . . .

That latent fingerprints were lifted from a door in the area of the robbery and they were not the fingerprints of the defendant, Conrad Smith.

. . . [T]hat [defendant] denied any knowledge of any robbery at Coble Dairy; that he stated that his car was never on Peace Street; that he did not lock himself out of his car; that he did not lend the car to anyone else on that Thursday;

Bearing in mind the paucity of evidence in the record favorable to defendant, we find that such evidence was fairly presented to the jury in the charge. The mere fact that the evidence favorable to the state occupied more space in the record than that favorable to defendant is not error. *State v. Sanders, supra*; *State v. Jessup*, 219 N.C. 620, 14 S.E.2d 668 (1941). There was not a total failure by the trial judge to present to the jury evidence favorable to defendant. Therefore, the rule expressed in *State v. Hewett*, 295 N.C. 640, 247 S.E.2d 886 (1978), that an objection to the charge is not required when there is a total failure of the trial court to summarize evidence favorable to defendant, is not applicable here. This appeal is governed by the general rule that an objection must be made to the court's review of the evidence before the jury retires so as to afford the trial judge an opportunity for correction. Otherwise, any errors in the court's review of the evidence are deemed to have been waived and will not be considered on appeal. *Id.* Defendant did not so object. This assignment of error is without merit.

In defendant's trial we find

No error.

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Chief Judge MORRIS and Judge WEBB concur.

IN THE MATTER OF: GREGORY P. LUCK, PETITIONER APPELLEE v. EMPLOYMENT
SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT APPELLANT

No. 8010SC452

(Filed 16 December 1980)

State § 12— dismissed employee — notice of appeal rights required

Due process under the U. S. and N. C. Constitutions requires that a permanent State employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before the 15 and 30 day time limits for notice of appeal provided in G.S. 126-35 and G.S. 126-38 commence to run.

APPEAL by Employment Security Commission of North Carolina from *Braswell, Judge*. Judgment entered 21 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 5 November 1980.

Gregory Luck was employed by the Employment Security Commission of North Carolina (hereinafter Commission) from 1975 to 1978. In 1977 he was injured in an automobile accident while on Commission business. He thereafter took a leave of absence and commenced receiving worker's compensation benefits. Upon information received, the Commission dismissed Luck from his employment on 24 July 1978 for working at a job with physical requirements exceeding those required in his work for the Commission. The dismissal letter to Luck of 24 July 1978 did not contain any notification to him of his rights to appeal the dismissal.

Mr. W. G. Mitchell, attorney for Luck, wrote several letters to the Commission concerning Luck's dismissal, but never received any answers to the substantive questions he asked. On 2 October 1978, Luck was certified by his doctor as being able to return to work and reported to the Commission for work, where he was told that he had been dismissed from employment. On 11 October 1978 attorney Mitchell formally requested an appeal to the State Personnel Commission of Luck's dismissal from employment. Respondent at no time advised Luck or his attorney of his appeal rights.

After hearing before officer Maynard of the State Personnel Commission, the officer denied the respondent's motion to dismiss the

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appeal as being untimely. The officer found that the Commission failed to advise Luck of his appeal rights. Therefore, the time limit on his appeal had not started to run, and the appeal to the State Personnel Commission on 11 October 1978 was timely. He further held Luck had been unlawfully dismissed from employment and ordered him reinstated to his former position with certain payments and benefits.

The respondent commission requested a rehearing and appealed to the full State Personnel Commission. After hearing, the full Personnel Commission affirmed the findings of officer Maynard, adopted them as its own, and ordered the same relief for Luck. Respondent appealed to the Superior Court of Wake County and Judge Braswell, after hearing, entered judgment affirming the decision of the State Personnel Commission. From this judgment, respondent appeals.

W. G. Mitchell for petitioner appellee.

Howard G. Doyle, Chief Counsel, and Gail C. Arneke, Staff Attorney, for respondent appellant.

MARTIN (Harry C.), Judge.

The only question presented by this appeal is whether Luck's appeal was timely. It appears that this is a case of first impression in North Carolina. The pertinent provisions of N.C.G.S. 126-35 and 126-38 are:

§ 126-35. . . . Any employee appealing any decision or State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth . . . the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department. . . . The employee, if he is not satisfied with the final decision of the head of the department, . . . may appeal to the State Personnel Commission. Such appeal shall be filed not later than 30 days after receipt of notice of the department head's decision.

§ 126.38. . . . Any employee appealing any decision or action to the Commission shall file a written statement of appeal with the Commission or its designate no later than

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30 days after receipt of notice of the decision or action which triggers the right of appeal.

Luck was a permanent employee within the meaning of N.C.G.S. 126-1, et seq. The Commission admits that it violated N.C.G.S. 126-35 by failing to advise Luck of his right to appeal. Nevertheless, the Commission contends the 30-day period for filing notice of appeal continued to run. We do not agree. N.C.G.S. 126-35 establishes a condition precedent that the employer must fulfill before disciplinary action against an employee may be taken. See *Jones v. Department of Human Resources*, 300 N.C. 687, 268 S.E.2d 500 (1980). The employer must furnish the employee with a written statement containing the specific acts or reasons for the disciplinary action and the employee's appeal rights.

In *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972), the Supreme Court of the United States established that a statute such as N.C.G.S. 126-35 creates an interest in continued employment that is safeguarded by due process under the Fourteenth Amendment of the United States Constitution. This interest arises from the act of the legislature and not from the contract of employment. See also *Faulkner v. North Carolina Dept. of Corrections*, 428 F. Supp. 100 (1977).

The purpose of the statute is to notify the employee of the reasons for the disciplinary action and to advise him of his rights to appeal the disciplinary action. We hold that due process under the United States and North Carolina constitutions requires that an employee be provided with a statement in writing setting forth his rights of appeal before the 15-day and 30-day time limits contained in N.C.G.S. 126-35 and 126-38 commence to run. This the respondent commission has failed to do. The appeal by Luck was timely.

The judgment of the superior court is affirmed.

Chief Judge MORRIS and Judge WEBB concur.

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STATE OF NORTH CAROLINA v. JAMES CUTHRELL, SR.

No. 8015SC652

(Filed 16 December 1980)

1. Narcotics § 3.1— contraband introduced at trial — chain of custody sufficiently shown

In a prosecution of defendant for possession and sale of marijuana and cocaine, there was no merit to defendant's contention that there was not a sufficient showing of a chain of custody of cocaine and marijuana identified at trial, since the officers who handled the drugs positively identified the exhibits and accounted for every link in the chain of possession; the State's evidence established a clear chain of identity between the substances an SBI agent testified defendant sold him and the substances which the State's chemist testified he tested and found to contain cocaine and marijuana; and the unique manner in which the marijuana was packaged substantiated the SBI agent's identification and tended to negate any inference that the agent was unable to distinguish the substances sold to him by defendant from the other narcotics occupying the agent's trunk.

2. Narcotics § 4.5— sale and delivery charged in bill of indictment — instruction on sale or delivery — no error

Where the bills of indictment charged defendant with sale *and* delivery of cocaine and marijuana, but the trial judge instructed with respect to sale *or* delivery, the fact that the trial judge charged in such a manner so that defendant was exposed to conviction of but one offense with respect to sale and delivery rather than two separate offenses as charged in the bills of indictment did not prejudice defendant.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 13 February 1980 in Superior Court, CHATHAM County. Heard in the Court of Appeals 12 November 1980.

Defendant James Cuthrell, Sr., was tried and convicted of possession of marijuana with intent to sell or deliver, possession of cocaine with intent to sell or deliver, sale or delivery of marijuana, and sale or delivery of cocaine. The indictments with regard to the latter two offenses charged defendant with sale *and* delivery of marijuana and of cocaine respectively.

The State's evidence tended to show that on 20 September 1979 in Chapel Hill, a special agent of the State Bureau of Investigation (SBI), John L. Bowden, met with defendant. At that time Bowden and defendant discussed and negotiated a sale by defendant to Bowden of a pound of marijuana and some cocaine. The sale was consummated later that day at a duplex apartment in Chatham County at which time Bowden took possession of a white powdery substance packaged in aluminum foil, and a green vegetable material contained in a ziploc

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plastic bag (State's Exhibit #7) which was wrapped in a black and white tablecloth (State's Exhibit #6) and placed in the bottom of a long plastic bag (State's Exhibit #5). Bowden placed his identifying marks on both packages. From 20 September 1979 until the times Bowden delivered each package to the SBI laboratory, he kept them in the locked trunk of his automobile. Bowden delivered the aluminum foil package to Thomas McSwain at the SBI laboratory sometime on 27 September 1979. Bowden delivered the bag containing the green vegetable material to Crosby Berry at the SBI laboratory sometime on 27 September 1979.

Berry, an SBI fingerprint expert, removed the green vegetable material contained in the package delivered to him, put it in an evidence bag, marked it for identification and gave it to McSwain. Berry's examination of State's Exhibits #5, #6 and #7, revealed a fingerprint matching that of defendant. Berry kept possession of these exhibits until their introduction at trial. Thomas McSwain, the SBI chemist who examined the contents of each package identified the white powdery substance as cocaine and the green vegetable material as marijuana. After his examination McSwain placed each substance in separate envelopes and returned them to Bowden. Bowden maintained possession until trial.

On cross examination, Bowden admitted that during the month of September, 1979, he purchased other narcotics which he also placed and locked in the trunk of his automobile. Bowden could not recall the exact number or varieties of the other purchases that occupied the trunk between 20 September 1979 and 27 September 1979.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Levine & Stewart, by Michael D. Levine, for the defendant appellant.

WELLS, Judge.

[1] Defendant first assigns error to the admission into evidence of the cocaine and marijuana identified at trial. Defendant contends that with respect to these exhibits there was not a sufficient showing of a chain of custody. This contention is without merit. The officers who handled the drugs positively identified the exhibits and accounted for every link in the chain of possession. *State v. Olsen*, 25 N.C. App. 451, 453, 213 S.E. 2d 372, 374 (1975); *cert. denied*, 287 N.C. 468, 215 S.E. 2d

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628 (1975). The State's evidence established a clear chain of identity between the substances Agent Bowden testified defendant sold him and the substances which the State's chemist testified he tested and found to contain cocaine and marijuana respectively. *State v. Rogers*, 43 N.C. App. 475, 480, 259 S.E. 2d 572, 576 (1979); *State v. Williams*, 20 N.C. App. 310, 312, 201 S.E. 2d 366, 367 (1973); *cert. denied*, 285 N.C. 89, 203 S.E. 2d 62 (1974) (substance purchased kept in locked trunk of agent's car). The unique manner in which the marijuana was packaged substantiates Agent Bowden's identification and tends to negate any inference that Bowden was unable to distinguish the substances sold to him by defendant from the other narcotics occupying Bowden's trunk.

[2] Defendant next assigns as error the failure of the trial court to properly instruct the jury as to the elements of the offenses charged in the bills of indictment. The indictments used the phrase "sell and deliver" instead of "sell or deliver". The pertinent statute, G.S. 90-95 (a) (1) makes it unlawful for any person to "manufacture, sell or deliver" a controlled substance. The evidence produced by the State tends to show both sale and delivery by defendant of each controlled substance. As to the cocaine, the trial court charged the jury as follows:

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the 20th day of September, 1979, James Cuthrell knowingly placed a quantity of cocaine within the dominion and control of James [*sic*] Bowden with the intent to transfer the possession of that cocaine to James [*sic*] Bowden and/or this act was done in exchange for \$400 in United States currency actually placed by James [*sic*] Bowden within the dominion and control of James Cuthrell, then it would be your duty to return a verdict of guilty of sale or delivery of cocaine. However, if you do not so find or if you have a reasonable doubt, then it would be your duty to return a verdict of not guilty.

A similar charge was given as to the marijuana.

The pertinent counts in the bills of indictment charged two acts, sale and delivery, which were a part of a single transaction. The two acts could have been charged as separate offenses. *See State v. Dietz*, 289 N.C. 488, 498, 223 S.E. 2d 357, 364 (1976). The fact that the trial judge charged the jury in such manner so that the defendant was exposed to conviction of but one offense with respect to sale and

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delivery rather than two separate offenses as charged in the bills of indictment does not prejudice defendant. *State v. O'Keefe*, 263 N.C. 53, 56, 138 S.E. 2d 767, 769 (1964), *cert. denied*, 380 U.S. 985, 14 L.Ed. 2d 277, 85 S.Ct. 1355 (1965); *see also State v. Dietz, supra*. We, therefore, find no error in the charge of the court.

No error.

Judges VAUGHN and MARTIN (Robert) concur.

STATE OF NORTH CAROLINA v. STEVEN DAVID HARPER

No. 805SC699

(Filed 16 December 1980)

1. Jury § 3.1— improper method of jury selection — defendant not prejudiced

Though the trial court deviated from the statutorily prescribed method of jury selection, defendant failed to show that he was prejudiced because he had full opportunity to examine and challenge prospective jurors and because, when the jury was finally constituted, defendant had one peremptory challenge remaining and had exercised no challenges for cause so that the jurors selected obviously met with his approval. G.S. 15A, Art. 72; G.S. 15A-1221 (3).

2. Criminal Law § 162— objection to evidence — similar evidence previously admitted

In a prosecution of defendant for breaking or entering and larceny, the trial court did not err in permitting a State's witness to testify concerning an entrance made into the building in question, since the witness had earlier testified, without objection, to substantially the same thing.

APPEAL by defendant from *Bruce, Judge*. Judgments entered 13 December 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 4 December 1980.

Defendant was tried and convicted on five counts of felonious breaking and entering and four counts of felonious larceny. From judgments of imprisonment, defendant appeals.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

Arnold Smith for defendant appellant.

WHICHARD, Judge.

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The record on appeal contains six assignments of error, two of which are presented and discussed in defendant's brief. The other assignments, because they are not presented and discussed, are deemed abandoned. Rule 28 (a), North Carolina Rules of Appellate Procedure; *State v. McMorris*, 290 N.C. 286, 292, 225 S.E.2d 553, 557 (1976); *State v. Brothers*, 33 N.C.App. 233, 234 S.E.2d 652, *cert. denied*, 293 N.C. 160, 236 S.E.2d 704 (1977).

[1] By the first assignment of error presented and discussed, defendant contends the trial court erred in directing the jury selection procedure. In summary, the procedure was as follows:

The trial judge directed the clerk to call the names of twenty-four prospective jurors. After explaining the charges against defendant and the burden of proof, the judge asked the twenty-four an extended series of questions routinely propounded to prospective jurors. During his questioning, the judge excused one person who indicated that he was the victim in a pending criminal case.

Upon completion of questioning by the court, the prospective jurors were tendered first to the State and then to the defendant for supplemental questions. After supplemental questioning by the State and the defendant, they were tendered first to the State and then to the defendant for the purpose of exercising peremptory challenges. The State and the defendant each exercised four peremptory challenges. The trial judge then advised the State and the defendant that each had three peremptory challenges remaining. The State exercised no further challenges, and the defendant exercised two. The defendant's exercise of two further peremptory challenges left one person to serve as the alternate juror. The trial then commenced.

Defendant correctly contends that this procedure did not comply with the provisions of G.S. 15A, Article 72, Selecting and Impaneling the Jury, and with G.S. 15A-1221 (3). He fails, however, to demonstrate any prejudice to his rights or that a different result would likely have ensued from following the jury selection procedure set forth in the statutes. In 4 Strong's North Carolina Index 3d, *Criminal Law* §167 at 851, the author states, with supporting citations:

To warrant a new trial, there should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and that a different result would likely have ensued. . . .

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....

Mere technical error will not entitle defendant to a new trial; it is necessary that error be material and prejudicial and amount to a denial of some substantial right.

This principle has been incorporated in the Criminal Procedure Act in G.S. 15A-1443 (a), which provides:

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

The defendant here had full opportunity to examine and challenge prospective jurors. Because, when the jury was finally constituted, defendant had one peremptory challenge remaining and had exercised no challenges for cause, the jurors selected obviously met with his approval. Under these circumstances we fail to see how defendant could have been prejudiced by the trial court's deviations from the statutorily prescribed method of jury selection. Therefore, this assignment of error is overruled.

[2] By the second assignment of error presented and discussed, defendant contends the court erred in permitting a State's witness to testify, in response to questioning about a photograph, "[t]hat is a view of the building looking toward the Northwest with my car and the patrol car there *where the entrance was made* into the building." (Emphasis supplied.) He argues that there was no proof at this point in the trial that an entrance had been made. His contention overlooks the prior testimony of this witness, admitted without objection, to the effect that a window of the building "was completely taken out" and that "whoever it was . . . had to completely remove the molding to completely remove the glass." The witness had also testified without objection, prior to the testimony objected to, that his inspection of "the building that had the window missing" had revealed that "there were a few packs of cigarettes and possibly a few bars of candy missing." "It is the well established rule that when evidence is admitted over objection but the same evidence has theretofore or thereafter been

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admitted without objection, the benefit of the objection is ordinarily lost.” *State v. Zimmerman*, 23 N.C.App. 396, 398, 209 S.E.2d 350, 352 (1974), *cert. denied*, 286 N.C. 420, 211 S.E.2d 800 (1975). Assuming, *arguendo* only, that defendant’s objection to the testimony in question was otherwise meritorious, he clearly lost the benefit of his objection by his failure to object to the above-recited testimony which had been admitted previously. This assignment of error is without merit and is overruled.

No error.

Judges HEDRICK and CLARK concur.

IN RE: ADOPTION OF WENDY JO SLOOP

No. 8019SC511

(Filed 16 December 1980)

Adoption § 2— child placed for adoption by trial court — improper procedure

The trial court erred in placing the child in question with petitioners for the purpose of adoption, since adoptions are permitted only upon the statutory procedure set out in G.S. Chapter 48, and, pursuant thereto, adoption is by a special proceeding before the clerk of superior court; moreover, there was no evidence to support the trial court’s finding that the department of social services, which had custody of the child, “wrongfully and unreasonably withheld its consent for adoption.”

APPEAL by respondent, Department of Social Services, from *Albright, Judge*. Order entered 11 March 1980 in Superior Court, CABARRUS County. Heard in the Court of Appeals 3 December 1980.

On 30 August 1979, the natural mother of the infant involved in this controversy surrendered the child to the Department of Social Services for placement for adoption. The Sloops, petitioners in this proceeding, had previously been approved by the Department to provide, under the supervision of the Department, foster care for such children as the Department might elect to place with them on a temporary basis. The Department so placed the subject child with the Sloops on or about 30 August 1979. Ordinarily, the Department requires foster parents with whom it places children to execute an agreement reciting the terms of the placement and the Department’s policy with respect thereto. One of the express provisions is that the foster parents will not initiate proceedings for adoption or placement

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without the prior written consent of the Department. The Department's form containing these provisions was given to the Sloops but was not signed by them. Just a few days after the three-month old child was placed with the Sloops for foster care, Mrs. Sloop called one of the Department's foster care workers and expressed her wish that the child be placed with them for adoption. She was told that the Department generally placed children who were old enough to be recognized out of the county. This child was recognized by a former babysitter the day after she was placed in the foster care of the Sloops. The natural mother had expressly urged the Department to place the child in another county saying, "I do not want to see my child when I walk down the street some day." Mrs. Sloop indicated that if the child could not be placed with them for adoption, it would probably be better to remove the child from her home. She was advised of the problems inherent in placing a recognizable child in the home county but was told that she was at liberty to apply to the Department. The Department usually considers between 30 and 50 applications before placing a child for adoption. The final decision is made by an adoption committee within the Department. At the request of the Sloops, the child was removed from their home and, on 11 October 1979, placed in another foster home.

The Sloops never filed an application with the Department for consideration as adoptive parents. Instead, on 26 October 1979, they started this proceeding by filing a petition for adoption. The Department was made a party to the proceedings upon allegations that the Department was unreasonably withholding its consent to the adoption. On 11 March 1980, after a hearing in the Superior Court, the judge entered an order requiring "that the child be placed with Petitioners for the purpose of adoption and that the Petitioners be granted adoption by the Cabarrus County Department of Social Services." The order was based, in part, upon the court's following conclusions:

18. That considering the totality of the circumstances the court finds that the Department of Social Services was unreasonable and unjustified by withholding its consent for adoption of the child by Petitioners, and that it is unreasonable under all the circumstances unique to this case to continue to withhold that consent;

19. That considering the totality of the circumstances the Court finds that it would be in the best interest of the child that the Petitioners be allowed to adopt the child;

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20. That the Cabarrus County Department of Social Services has wrongfully and unreasonably withheld its consent for adoption of the child by Petitioners.

The Department appeals.

Robert L. Saunders, for petitioner appellees.

Williams, Willeford, Boger, Grady and Davis, by Samuel F. Davis, Jr., for respondent appellant.

VAUGHN, Judge.

We note at the outset that adoptions are permitted only upon the statutory procedures set out in Chapter 48 of the General Statutes of North Carolina. Adoption is by a special proceeding before the Clerk of Superior Court. G.S. 48-12; *In re Custody of Simpson*, 262 N.C. 206, 136 S.E. 2d 647 (1964). If the order of the trial judge "that the child be placed with Petitioners for the purpose of adoption and that the Petitioners be granted adoption by the Cabarrus County Department of Social Services" were allowed to stand, most of the express statutory provisions and legislative policy of Chapter 48 will have been ignored. Moreover, there is no evidence to support a finding or conclusion that the Department has "wrongfully and unreasonably withheld its consent for adoption." When the natural parents surrendered their child to the Department, the Department was placed in the shoes of the parents as to legal custody and the right to refuse or consent to legal adoption by particular individuals. It is given all of the rights the parents had except inheritance. G.S. 49-9.1 (1). The Department has adopted well reasoned and time proven policies for execution of that grave trust. There is nothing in the record to indicate that the actions of the Department have not been in the best interest of the child entrusted to them by its parents.

In the light most favorable to petitioners, the evidence shows that they are good people who, during the few weeks the child was with them, developed a strong attachment for her. If they were allowed to adopt the child, they would provide a good home and be loving parents. The realities are, however, that there are many other prospective adoptive parents about whom the same could be said. The Department must be left at liberty to consider all of them. It is, however, for the Department and not the court to make the appropriate investigation and placement in keeping with the best interest of the child and the trust placed in it by the parents who surrendered the

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child to them for that purpose. The Department's responsibility in this matter should not be frustrated by a race to the courthouse door by hopeful adoptive parents who have neither legal nor physical custody of the child or the consent of the Department as required by the statute. The lawful placement of this child has now been obstructed for more than a year by the institution of this proceeding by petitioners.

The order from which the Department appealed is vacated, and the case is remanded for an order dismissing the proceeding.

Reversed and Remanded.

Judges MARTIN (Robert M.) and WELLS concur.

ROSE Z. WEAVER KYLE v. JOHN H. GROCE & WILLIAM A. GROCE, JR., Co-ADMINISTRATORS OF THE ESTATE OF JAY GROCE, DECEASED; AND WILKES SAVINGS & LOAN ASSOCIATION

No. 8023DC513

(Filed 16 December 1980)

Trusts § 1.2— words written on savings account application — no trust created with right of survivorship

Where deceased opened a savings account and on the application form wrote, "Payable to Rose Z. Weaver, as survivor only," there was no trust created with right of survivorship, since there was no evidence of a transfer or assignment of a present beneficial interest but only the expression of a desire that plaintiff own the account at the death of the depositor.

APPEAL by plaintiff from *Osborne, Judge*. Judgment entered 22 April 1980 in District Court, WILKES County. Heard in the Court of Appeals 3 December 1980.

In this action, the plaintiff seeks to be declared the owner of a savings account established by Jay Groce, deceased, with Wilkes Savings and Loan Association. The defendants moved for summary judgment. The papers filed in regard to the motion for summary judgment revealed that an application by Jay Groce for a savings account to the savings and loan association contained the following statement in parenthesis under Mr. Groce's name on the signature

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card: "Payable to Rose Z. Weaver, as survivor only." Plaintiff brought this action after the demise of Mr. Groce.

Judge Osborne granted the defendants' motion for summary judgment, and the plaintiff appealed.

Max F. Ferree, by George G. Cunningham, for plaintiff appellant.

Moore and Willardson, by Larry S. Moore and Robert P. Laney, for defendant appellees.

WEBB, Judge.

Plaintiff does not contend that this case is governed by G.S. 41-2.1 which deals with the right of survivorship in deposits created by written agreement. She does contend that there is a triable issue as to whether Jay Groce created a Totten or tentative trust for her. If Jay Groce created a trust for plaintiff with a right of survivorship, it would be by the phrase "Payable to Rose Z. Weaver, as survivor only" which appeared on the application card. We hold that this language does not meet the requirements in this state for the establishment of a trust with right of survivorship.

In *Westcott v. Bank*, 227 N.C. 39, 40 S.E. 2d 461 (1946), the deceased deposited money in a bank account with written instructions to the bank as follows: "I would like to make this an 'in trust for' account so I am the only person who can withdraw from it. In case I become deceased I would like to make an agreement with you so as to make my beneficiary my grandfather . . . eligible to receive the money . . ." Our Supreme Court held that, since there was not evidence of a transfer or assignment of a present beneficial interest in the deposit, no trust was created. The fact that the depositor directed that his grandfather was to have the money at the death of the depositor was not enough to create a trust for the grandfather with a right of survivorship. We hold that *Wescott* controls the case sub judice. In this case there was no evidence of a transfer or assignment of a present beneficial interest but only the expression of a desire that the plaintiff own the account at the death of the depositor. This did not create a trust for plaintiff with a right of survivorship. See also *Ridge v. Bright*, 244 N.C. 345, 93 S.E. 2d 607 (1956) and *Baxter v. Jones*, 14 N.C. App. 296, 188 S.E. 2d 622, cert. denied, 281 N.C. 621, 190 S.E. 2d 465 (1972).

The language used on the application at its best is an attempt by Jay Groce to pass the savings account to the plaintiff at his death. It

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does not comply with the requirements of a will. Chapter 31, Art. I of the North Carolina General Statutes.

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. NANCY SMALL TYNER

No. 8026SC587

(Filed 16 December 1980)

Criminal Law § 4; Courts § 3—solicitation to commit offense — no felony — no jurisdiction in superior court

Solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature; solicitation to commit a crime against nature is therefore not an "infamous misdemeanor" under G.S. 14-3; and the superior court therefore did not have original jurisdiction of such a charge.

APPEAL by the State from *Snepp, Judge*. Order entered 20 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 4 November 1980.

Defendant was indicted for solicitation to commit a crime against nature on 9 July 1979. Defendant filed a motion to dismiss the indictment on 20 February 1980, contending that "the Superior Court is without jurisdiction to try said matter for that the same charges a misdemeanor and that the original jurisdiction of such charge is in the District Court." From an order dismissing the indictment on the requested grounds, the State appealed pursuant to G.S. § 15A-1445 (a).

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

James B. Ledford, for the defendant appellee.

HEDRICK, Judge.

The sole question presented by this appeal is whether the superior court has original jurisdiction to try the offense with which defendant was charged. G.S. §§ 7A-271 and 7A-272 provide that the exclusive and original jurisdiction for the trial of all criminal actions below the grade of felony, with several exceptions not here in issue,

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shall be in the district court, while the trial of all felony actions shall be within the exclusive and original jurisdiction of the superior court.

Citing *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938), the State asserts that an *attempt* to commit a crime against nature has been declared to be an infamous misdemeanor under G.S. § 14-3, and that G.S. § 14-3 provides that "infamous misdemeanors" are to be felonies. To this we agree. *See, e.g., State v. Harward*, 264 N.C. 746, 142 S.E.2d 691 (1965); *State v. Mintz*, 242 N.C. 761, 89 S.E.2d 463 (1955). The State further contends, however, that *solicitation* to commit a crime against nature is the same as an attempt to commit a crime against nature, thus making solicitation to commit a crime against nature an "infamous misdemeanor" felony properly within the original jurisdiction of the superior court. To this we cannot agree.

The offense of crime against nature is of course a felony in this State. G.S. § 14-177; *State v. Harward*, *supra*. The gravamen of the offense of solicitation to commit a felony lies in counseling, enticing, or inducing another to commit a crime. *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed.2d 281, 98 S.Ct. 402 (1977). The offense of solicitation is complete with the act of solicitation, even though there never could be acquiescence in the scheme by the one solicited, *State v. Keen*, 25 N.C. App. 567, 214 S.E.2d 242 (1975), and even where the solicitation is of no effect. *State v. Hampton*, 210 N.C. 283, 186 S.E. 251 (1936).

Attempt to commit a felony, on the other hand, involves an intent to commit the felony indicated and an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980); *State v. Bailey*, 4 N.C. App. 407, 167 S.E.2d 24 (1969). The overt act involved need not be the last proximate act to the consummation of the felony attempted to be perpetrated, but it must be near enough to it to stand either as the first or some subsequent step in a direct movement toward the commission of the felony. *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

In our view, solicitation to commit a felony and attempt to commit a felony are two separate and distinct offenses. The crime of solicitation, unlike attempt, does not involve an overt act toward the commission of the underlying felony, as the crime of solicitation is complete with the mere act of "enticing or inducing." Moreover, the elements of the two offenses require two very different types of ana-

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lyses. We hold that solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature, that solicitation to commit a crime against nature is therefore not an "infamous misdemeanor" under G.S. § 14-3, and that the superior court properly dismissed the indictment for want of jurisdiction.

Affirmed.

Judges CLARK and WHICHARD concur.

SANFORD J. SMITH v. JESSE P. MORGAN, JR.

No. 8020SC462

(Filed 16 December 1980)

Corporations § 25— note signed by president before incorporation — president personally liable

In an action to recover on a promissory note executed in Georgia and payable in Georgia, Georgia law applied so that defendant could be held personally liable on the note which he executed as president of a corporation which had not yet been formed, but which was subsequently incorporated and which made payments on the note until default.

APPEAL by defendant from *Lupton, Judge* and *Mills, Judge*. Orders filed 1 February 1979 and 23 January 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 6 November 1980.

This is an action on a promissory note made by Beefmaster, Inc., a Georgia corporation, to plaintiff. Defendant executed the note in Georgia on 19 November 1970 as president of Beefmaster, Inc. Beefmaster, Inc. was subsequently incorporated on 31 December 1970. The note was in partial payment for a business located in Georgia and all payments on the note were to be made in Georgia. After making some payments, Beefmaster, Inc. defaulted on the note.

Subsequent to filing the pleadings, both parties filed motions for summary judgments. On 1 February 1979 Judge Lupton granted plaintiff's motion on the issue of liability only. On 14 January 1980, pursuant to stipulations by the parties, Judge Mills entered judgment for the plaintiff in the sum of \$90,400, from which defendant appealed.

Van Camp, Gill & Crumpler by Douglas R. Gill, for the plaintiff-appellee.

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Johnson, Poole and Webster by Samuel H. Poole, for the defendant-appellant.

MARTIN, (Robert M.), Judge.

The sole question presented by this appeal is whether the defendant can be held personally liable on a note that he executed as president of a corporation which had not yet been formed, but which was subsequently incorporated and which made payments on the note until default.

First we note that we must apply the law of the State of Georgia in determining this question, as the note was executed in Georgia and was payable in Georgia. *Bank v. Appleyard*, 238 N.C. 145, 77 S.E. 2d 783 (1953); *Hatcher v. McMorine*, 15 N.C. 122 (1833). Contrary to the North Carolina rule, the Georgia rule is that a promoter of a prospective or non-existent corporation is personally liable on a contract he signs while purporting to act as the agent of such corporation unless the other party to the contract agrees to look to some other person for payment. *Wiggins v. Darrah*, 135 Ga. App. 509, 218 S.E. 2d 106, cert. denied (1975); *Dehco, Inc. v. Greenberg*, 105 Ga. App. 236, 124 S.E. 2d 311 (1962); *Wells v. J. A. Fay & Egan Co.*, 143 Ga. 732, 85 S.E. 873 (1915). *Wells v. J. A. Fay & Egan Co., id.*, which has never been overruled or questioned by the courts of Georgia, governs this case. The defendants in *Wells* had signed a contract for the purchase of machinery in the name of a corporation which had not yet been incorporated. The defendants received the machinery and executed notes as part of the consideration for the machinery. Those notes were signed for the corporation by a person purporting to be the secretary and treasurer of the corporation. After being incorporated, the corporation made some payments on the note in question. The court held the persons who authorized the signature on the notes to be personally liable. In reaching that decision, the Georgia court stated that acceptance by the creditor of partial payments from the subsequently organized corporation and his prosecution of a proceeding to hold the corporation liable on the debt as being its obligation did not extinguish the promoters' liability or estop the creditor from asserting the personal liability of the promoters. The *Wells* case has been cited with approval by the Georgia courts as recently as 1975 in *Wiggins v. Darrah*, *supra*, and 1962 in *Dehco, Inc. v. Greenberg*, *supra*.

After carefully studying the Georgia law applicable to this case and after carefully scrutinizing the record on appeal, we feel that the

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trial court was correct in granting summary judgment in plaintiff's favor.

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. ANTHONY JEROME PEARCY

No. 8028SC697

(Filed 16 December 1980)

Burglary and Unlawful Breakings § 7.1; Larceny § 9— verdict not reached on breaking or entering charge — conviction of felonious larceny proper

A defendant who is tried for acting in concert with others to commit felonious larceny after a felonious breaking or entering may be convicted of felonious larceny if the jury does not reach a verdict as to the felonious breaking or entering.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 14 March 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 3 December 1980.

The defendant was charged with felonious breaking or entering and felonious larceny. The evidence tended to show that the defendant and three other men broke the windows of a department store in Asheville and removed merchandise having a value of \$940.00.

The court charged the jury that they could find the defendant guilty of felonious breaking or entering if they found beyond a reasonable doubt that he acted in concert with others to break or enter. He also charged they could find the defendant guilty of felonious larceny if they found beyond a reasonable doubt that he acted in concert with others to commit larceny after breaking or entering. He did not charge on the value of the property taken or that the jury could find the defendant guilty as an aider and abettor. The jury did not reach a verdict as to the charge of felonious breaking or entering, but found the defendant guilty of felonious larceny.

From a sentence imposed, the defendant has appealed.

Attorney General Edmisten, by Associate Attorney Evelyn M. Coman, for the State.

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Whalen, Hay and Cash, by Gary S. Cash, for defendant appellant.

WEBB, Judge.

The question posed by this appeal is whether a defendant who is tried for acting in concert with others to commit felonious larceny, after a felonious breaking or entering, may be convicted of felonious larceny if the jury does not reach a verdict as to the felonious breaking or entering. The appellant contends we are bound by *State v. Keeter*, 35 N.C. App. 574, 241 S.E. 2d 708 (1978). In *Keeter*, it was held that if the jury is unable to reach a verdict on the felonious breaking or entering charge, the court cannot accept a verdict of guilty to felonious larceny absent an instruction as to the duty of the jury to fix the value of the property. We hold this case is governed by *State v. Curry*, 288 N.C. 312, 218 S.E. 2d 374 (1975). In that case the defendant was charged with felonious breaking or entering and felonious larceny. The court charged as to aiding and abetting a felonious breaking or entering and aiding and abetting a felonious larceny after a breaking or entering. The jury found the defendant not guilty of breaking or entering but found him guilty of felonious larceny after breaking or entering. Our Supreme Court held that these two verdicts were consistent. It said that the jury could have found that the defendant was not an aider and abettor on the breaking count, but did aid and abet in committing larceny after the principals had broken in the building. We believe this principle governs when the defendant is tried for acting in concert with others. If the jury may so find as to aiding and abetting, we believe they may also consistently find that the defendant did not act in concert to break or enter but did act in concert with others to commit larceny after the breaking or entering.

No error.

Judges MARTIN (Harry C.) and HILL concur.

CASES RECORDED WITHOUT PUBLISHED OPINION**Filed 16 December 1980**

BANK v. ROBERTSON No. 8015DC509	Orange (78CVD711)	Affirmed
DEPT. OF TRANSPORTAION v. PELHAM No. 8017SC464	Caswell (79CVS81)	Reversed
FOLTZ v. MERICHEM No. 8027SC515	Gaston (79CVS1274)	Dismissed
IN RE BALLANCE No. 801SC376	Pasquotank (80CRS552)	Reversed
IN RE HOWARD No. 8026DC632	Mecklenburg (80J0012)	Reversed
IN RE HURST No. 8019SC216	Rowan (77SP132)	Appeal Moot
JOHNSON v. JOHNSON No. 8017DC495	Surry (78CVD643)	Error and Remanded
MILLS v. MILLS No. 803DC529	Craven (78CVD758)	Reversed in Part Affirmed in Part
STATE v. BAREFOOT No. 804SC739	Sampson (80CRS1432)	No Error
STATE v. CROMARTIE No. 8012SC753	Cumberland (79CRS13174)	No Error
STATE v. FAIRCLOTH No. 8012SC769	Cumberland (79CRS12510)	Judgment Arrested (Assault with Deadly Weapon); No Error (Armed Robbery)
STATE v. GOODMAN No. 8026SC481	Mecklenburg (78CRS150354) (78CRS150355)	No Error
STATE v. HILL No. 8026SC692	Mecklenburg (79CRS63770)	No Error
STATE v. LITTLE No. 8020SC714	Richmond (80CRS1790)	No Error

STATE v. McCLAIN No. 8010SC743	Wake (80CRS4736)	No Error
STATE V. ROBINSON No. 8014SC538	Durham (79CRS19948)	No Error
STATE v. SAUNDERS No. 8017SC713	Rockingham (80CR116)	No Error
STATE v. STALLINGS No. 8010SC706	Wake (79CR59174)	No Error
STATE v. SWIFT No. 8012SC733	Cumberland (79CRS32603)	No Error

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STATE OF NORTH CAROLINA v. JOE WESLEY SPICER, JR; STATE OF NORTH CAROLINA v. JEFFERY DALE SPICER

No. 8023SC596

(Filed 6 January 1981)

1. Criminal Law § 89.8— offer of leniency to State's witness — failure to give defendant written notice — harmless error

The district attorney violated G.S. 15A-1054(c) by failing to give defendants written notice prior to trial of an offer to permit a State's witness to plead guilty to misdemeanors in eleven felony cases pending against him in return for his truthful testimony against defendants where the witness testified that, although no deal had been made, he nevertheless expected the district attorney to reduce the felony charges to misdemeanors, and it appeared that the plea bargain offer may have induced the witness's testimony. However, the district attorney's noncompliance with the statute did not require suppression of the witness's testimony since the remedy for failure to comply with the statute was to move for a recess.

2. Criminal Law § 117.3— State's witness — plea bargain arrangement — sufficiency of instructions

The trial judge in a murder case sufficiently informed the jury of a possible agreement between the district attorney and a State's witness that the witness would be allowed to plead guilty to misdemeanors in eleven felony cases pending against him in return for his truthful testimony against defendant.

3. Criminal Law § 89.1— character evidence — reputation of witness for truth and veracity

The trial court properly refused to allow defense counsel to cross-examine a witness about the general reputation of the State's chief witness for truth and veracity, since an impeaching character witness may be asked only about the general reputation or character of another witness.

4. Criminal Law § 33.4— irrelevant evidence — harmless error

Although evidence elicited by the prosecutor in cross-examination of defendants' half-brother that he owned two shotguns and three rifles was irrelevant in this murder prosecution, error in the admission of such evidence was not prejudicial to defendants.

5. Criminal Law § 45.1— experimental evidence — lighting conditions at crime scene

The trial court in a murder case did not err in admitting evidence of an experiment as to lighting conditions at the murder scene where the evidence offered on *voir dire* supported the trial court's finding that the conditions at the time of the experiment were substantially similar to those existing at the time of the alleged murder, although the evidence on *voir dire* was conflicting as to the conditions on those two days.

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6. Homicide § 21.7— second degree murder — sufficiency of evidence

The State's evidence was sufficient to support convictions of defendants for second degree murder where it tended to show that the victim, a State's witness, and another person were standing in the front yard of the witness's house at 4:00 a.m.; the witness heard a vehicle approaching the house, and heard one defendant screaming at him; the witness saw such defendant driving a pickup truck on the road in front of the house and saw the second defendant firing a gun from the back of the pickup; after passing the house, the pickup turned around and drove by the house again, at which time the second defendant fired several more shots; and the victim sustained a gunshot wound in the neck and died as a result thereof.

7. Homicide § 30.2— murder prosecution — submission of manslaughter not required

The evidence in a murder prosecution was insufficient to support a jury finding that defendants acted in the heat of passion caused by adequate provocation so as to require the court to instruct the jury on the lesser included offense of voluntary manslaughter where there was evidence tending to show that one defendant fired shots from a passing truck at 4:00 a.m. toward a State's witness who was standing in front of his own house and struck and killed the victim who was standing with the witness; there had been discord between the families of defendants and the State's witness prior to the date of the shooting; defendants' mother arrived at a hospital at about 1:30 or 2:00 a.m. prior to the shooting for the treatment of a gunshot wound and had been visited there by defendants; and defendant who was driving the truck yelled out at the time the shots were fired that he would kill the father of the State's witness who was in the house if defendants' mother died, since there was no evidence as to who assaulted defendants' mother, and the events giving rise to the wounds suffered by defendants' mother were considerably removed in time from the events surrounding the shooting death of the victim.

APPEAL by defendants from *Walker, (Hal Hammer), Judge*. Judgment entered 29 November 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 5 November 1980.

Defendants were charged in separate bills of indictment with the murder of Robin Darlene Griffin. The cases were consolidated for trial. From judgment imposed on jury verdicts finding each defendant guilty of second degree murder, defendants appeal.

The State's evidence tends to show that in the early morning of 22 July 1979, Henry A. Minton, Gary Perry and a friend of Perry's, Robin Griffin, were standing in the front yard of Minton's house. Various carport lights and floodlights attached to the front of the house were illuminated. Sometime shortly after 4:00 a.m., Minton heard a vehicle approaching the house, and then heard Joe Spicer, Jr. screaming at him. Minton saw Joe Spicer, Jr. driving his pick-up truck on the road in front of the house, and saw Jeff Spicer firing a gun at

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Minton from the back of the pick-up. Upon passing the house, the pick-up turned around and drove by the house again. At this time Jeff Spicer fired several more shots. Robin Griffin, standing with Minton in front of the house, sustained a gunshot wound to the neck and died as a result. Defendants presented alibi evidence. The evidence will be discussed in more detail in the body of the opinion.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Max F. Ferree, P.A., for defendant Joe Wesley Spicer, Jr.

William C. Gray, Jr., for defendant Jeffery Dale Spicer.

WELLS, Judge.

Defendants' first assignment of error focuses on several instances during trial when the trial judge either questioned witnesses about their testimony or commented about testimony. Defendants contend that by this action, the trial judge erroneously expressed an opinion in the presence of the jury. We have carefully examined the record with respect to this assignment and find no prejudicial conduct on the part of the trial judge.

[1] Defendants next make several assignments of error based upon an offer of charge reduction made by the district attorney to Henry A. Minton for the purpose of securing Minton's truthful testimony against defendants in the case *sub judice*. Defendants first contend that the trial court erred in not requiring the district attorney to comply with G.S. 15A-1054 which authorizes charge reductions in exchange for truthful testimony but provides:

(c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

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From the record it appears that defense counsel was first apprised of the offer at a bench conference out of the hearing of the jury during the examination of Henry Minton at trial. At that time the district attorney explained that Minton had eleven felony indictments pending, and that in return for Minton's truthful testimony against defendants, the district attorney had offered to let Minton plead guilty to misdemeanors in the eleven charges and not to schedule the cases for trial until Minton's current probation was terminated. Defendants contend that G.S. 15A-1054 was violated because defendants did not receive written notice of this offer. We agree.

The State contends that there was no agreement and that therefore the statute did not apply. Although the district attorney stated that there was no agreement and although at one point in his testimony, Henry Minton stated "I ain't made no deal", the plea bargain may still be enforceable if the offer induced Minton's testimony. See Note, *Enforcement of Plea Bargaining Agreements*, 51 N.C.L. Rev. 602, 609 (1973). Promises by prosecutors of assistance or leniency, even if tentative, might be interpreted by a witness as contingent upon the nature of his testimony. See *Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir. 1979); *State v. Edwards*, 37 N.C. App. 47, 48-49, 245 S.E. 2d 527, 528 (1978). Although Minton denied that a deal had been made, he nevertheless testified that he expected the district attorney to drop the felony charges to misdemeanors if Minton pled guilty to them. Minton's credibility as a witness was an important issue in the prosecution of defendants and evidence of any understanding or agreement with the district attorney for leniency was relevant to Minton's credibility. See *Campbell v. Reed*, *supra*.

Although the district attorney should have complied with G.S. 15A-1054(c), such non-compliance does not require suppression of Minton's testimony. *State v. Lester*, 294 N.C. 220, 229, 240 S.E. 2d 391, 398-99 (1978); *State v. Edwards*, *supra*. The defendants' remedy for failure to comply with the statute was to move for a recess. G.S. 15A-1054(c). In this case, defendants did not request a recess and did not except on the basis of failure to grant a recess. Defendants have not shown any prejudice by the lack of the required notice, and this assignment is overruled. *State v. Lester*, *supra*.

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[2] Defendants also assign error to the failure of the trial judge to inform the jury of the full extent of the understanding between the district attorney and Henry Minton, to the trial judge's refusal to allow all of defendant counsel's questions when cross-examining Minton about the offer of leniency, and to the trial judge's failure to adequately instruct the jury about the purported deal. We disagree and hold that the jury was fully informed of the possible agreement between the district attorney and Minton prior to the time it began deliberations. *See State v. Cousins*, 289 N.C. 540, 545, 223 S.E. 2d 338, 342 (1976). Counsel for defendants cross examined Minton extensively on the specific crimes charged under the indictments and on "the kind of deal" Minton had with the district attorney. After questioning Minton about the crimes charged, defense counsel would inquire, "What kind of deal do you have with the prosecutor in return for your testimony here today as to that?" Minton's repeated response was "I told you I could plead guilty to a misdemeanor." In view of the lengthy and repetitious cross examination of Minton on this issue, we cannot say that the trial judge erred in sustaining objections to three of the approximately forty questions that defense counsel propounded. *See State v. Abernathy*, 295 N.C. 147, 151-52, 244 S.E. 2d 373, 377 (1978); *State v. McPherson*, 276 N.C. 482, 487, 172 S.E. 2d 50, 53-54 (1970). In holding that the jury was adequately informed of the possible agreement of charge reduction, we note that the trial judge charged the jury in part:

[T]he Court charges you that as to any arrangements that were made, if any were made, and there is some evidence that the witness, Henry Allen Minton, was testifying under some understanding for a charge reduction in return for his testimony in these cases. If you find that Henry Minton testified in whole or in part for this reason, you should examine his testimony with great care and caution in deciding whether or not to believe it.

Each of defendants' assignments of error regarding Minton's possible agreement with the district attorney is overruled.

[3] Defendants' next assignment of error relates to the following exchange in the record, when Kyle Gentry, the sheriff who investigated the shootings, was testifying:

CROSS EXAMINATION by Mr. Gray [counsel for defend-

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ant Jeff Spicer]:

[Gentry:] I have known Mr. Minton for three or four years. Yes, sir, since before I was elected Sheriff.

Q. And, Sheriff Gentry, would it be a fair statement that you believe very little of what Henry Minton says?

MR. ASHBURN [District Attorney]: OBJECTION.

COURT: OBJECTION SUSTAINED.

Q. Sheriff, what's the general reputation of Henry Minton as to his truth and honesty?

MR. ASHBURN: OBJECTION unless he can say he knows it.

COURT: Well, yes.

MR. FERREE: Cross examination.

COURT: Well, one thing you're limiting it to a specific person, if he knows his general character and reputation he can say so. If he wants to elaborate he may say so. That's fundamental. OBJECTION SUSTAINED.

Q. Sheriff Gentry, do you know the general reputation and character of Henry Minton here in the community in which he lives.?

A. Yes, I do.

Q. And what is that?

A. It's not good.

Q. No further questions.

Defendants assign as error the trial court's refusal to allow defense counsel to cross examine Gentry about Henry Minton's general reputation for truth and veracity. This contention has no merit. The established rule allows only two questions to be asked of an impeaching character witness: (1) whether he knows the general reputation and character of the party, and (2) what that general reputation or character is. The witness may amplify or qualify his answers to the latter question with regard to specific virtues or vices of the party but counsel offering the witness may not suggest that the witness do so. *State v. Abernathy, supra*, at 166-67, 244 S.E. 2d at 385-86; *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897). The trial judge's rulings with regard to this issue were proper.

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[4] Defendants' next assignment of error regards the State's cross examination of one of defendants' witnesses, Ted Porter, the half-brother of defendants who testified as to the defendants' whereabouts prior to 4:00 a.m. on 22 July 1979. The district attorney asked Porter how many shotguns and rifles Porter owned. Defense counsel's objection was overruled. Porter answered that he owned two shotguns and three rifles. Defendants contend that such evidence was immaterial and had the sole effect of exciting the prejudice of the jurors. The admission of irrelevant evidence is ordinarily considered harmless error and the burden is upon appellant to show that he was prejudiced. *State v. Atkinson* 298 N.C. 673, 683, 259 S.E. 2d 858, 864 (1979). Although we agree that the disputed evidence was not relevant, defendants have not carried their burden of showing a reasonable possibility that had it not been for this irrelevant evidence's admission, a different result would have ensued. *State v. Atkinson, supra*, at 684, 259 S.E. 2d at 865; G.S. 15A-1443(a). This assignment of error is overruled.

[5] Defendants' next three assignments of error concern the admission as experimental evidence of a lighting experiment. On 31 July 1979 at approximately 4:00 a.m., Henry Minton, Kyle Gentry and two other persons, stood in the front yard of Minton's house with the various carport lights and floodlights attached to the front of the house illuminated. Steve Cabe, a special agent of the North Carolina State Bureau of Investigation, drove by in a pick-up truck. Pictures were taken. At the *voir dire* examination regarding the experiment there was testimony that the weather conditions on the nights of 22 July and 31 July were very similar, and that the houselights had not been altered between the two dates. Defendants presented evidence tending to show that the weather was foggy on the night of 22 July but clear on the night of 31 July. Subsequent to the *voir dire* examination, the trial judge found specific facts regarding the weather on the two dates and that the conditions existing when the experiment was performed were substantially the same as on the date at issue so that proper evidence with regard to the experiment could be introduced.

Defendants contend the trial judge committed error as follows: (a) in allowing before the jury the lighting experiment; (b) in failing to make proper findings at the conclusion of the *voir dire* examination, and (c) in failing to strike the experiment. The trial court is allowed a broad latitude of discretion in the admission of experimental evidence,

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especially with reference to the similarity of conditions existing at the time of the crime and conditions at the time of the experiment. See *State v. Carter*, 282 N.C. 297, 300, 192 S.E. 2d 279, 281 (1972). We hold that in this case the trial judge did not abuse his discretion in his rulings concerning the experiment. See *State v. Jones*, 287 N.C. 84, 98-99, 214 S.E. 2d 24, 34-35 (1975). The evidence offered on *voir dire* supported the trial judge's findings of fact, and in our opinion the trial judge was not "too wide of the mark" in determining that the conditions during the experiment were substantially similar to those surrounding the alleged homicide. *State v. Jones, supra*, at 99, 214 S.E. 2d at 34. Defendants' three assignments of error concerning this experiment are overruled.

[6] Defendants next assign error to the trial judge's denial of defendants' motions for judgment as of nonsuit. Defendants contend that there was not sufficient evidence of each essential element of the offense of second degree murder or that defendants had committed that offense. In considering defendants' motions, the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Clark*, 300 N.C. 116, 125, 265 S.E. 2d 204, 210 (1980). If there is direct or circumstantial evidence, or a combination of both, from which the jury could find that defendants committed the offense charged, the motion for judgment as of nonsuit must be denied. *State v. Jones, supra*, at 101, 214 S.E. 2d at 36. Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Wilkerson*, 295 N.C. 559, 577, 247 S.E. 2d 905, 915 (1978); *State v. Wrenn*, 279 N.C. 676, 681, 185 S.E. 2d 129, 132 (1971). The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful, and (2) done with malice. *State v. Duboise*, 279 N.C. 73, 81, 181 S.E. 2d 393, 398 (1971). See also *State v. Wrenn, supra*. Here, all the evidence tends to show that the defendants were engaged in a deliberate course of conduct which included the intentional firing of a gun a number of times in the direction of the deceased girl, the bullets from such shots hitting her and another person. Such evidence was clearly sufficient to overcome defendants' motions of nonsuit and to justify the jury's verdict of guilty of second degree murder. This assignment is without merit and is overruled.

[7] Defendants' final assignment of error concerns the failure of the

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trial judge to instruct the jury on the lesser included offense of voluntary manslaughter. When there has been some evidence presented of defendant's guilt of a lesser included offense, defendant is entitled to have the question submitted to the jury even if there was no specific prayer for such instruction. *State v. Bell*, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973). Voluntary manslaughter is the unlawful killing of a human being without malice, and without premeditation or deliberation. *State v. Wilkerson*, *supra*, at 577, 247 S.E. 2d at 915, *quoting with approval State v. Wrenn*, *supra*, at 681, 185 S.E. 2d at 132. A killing is without malice if the one who kills acted while under the influence of passion or in the heat of blood produced by adequate provocation. *State v. Williams*, 296 N.C. 693, 701, 252 S.E. 2d 739, 744 (1979). Defendants contend that there was some evidence that defendants acted in the heat of passion caused by *adequate provocation*.

There was evidence in the record that there had been discord between the Minton and Spicer families prior to 22 July. The evidence also indicated that the defendants' mother arrived at Wilkes Hospital at about 1:30 or 2:00 on the morning of 22 July for treatment of a gunshot wound. Various friends and members of her family, including defendants, visited defendants' mother at the hospital in the early morning hours. The record also contained the testimony of Henry Minton's father who was inside the Minton house at the time of the crime at issue. Minton's father testified that at that time he heard shots being fired in front of the house.

Q. All right, what occurred then?

A. Joe, Jr. said, "Minton," said, "come on out here," said, "I'm going to blow your God-damn brains out," and he kept saying, "Open that door if you don't believe I'll blow your brains out," and he said that, uh, "If my mother dies, you better believe I will kill you."

Defendants assert that this testimony is evidence that defendants acted in the heat of passion.

Defendants' argument is grounded in the proposition that "heat of passion," *i.e.*, rage, anger, hatred or furious resentment rendering the mind incapable of cool reflection, is sufficient to show lack of malice. Mere "heat of passion" is not enough. Such "heat of passion" must arise upon reasonable or adequate provocation, which in turn can only arise under circumstances amounting to an assault or a

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threatened assault. *State v. Williams, supra*, at 702, 252 S.E. 2d at 745; *State v. Watson*, 287 N.C. 147, 156, 214 S.E. 2d 85, 90-91 (1975); *see also State v. Hamrick*, 30 N.C. App. 143, 148, 226 S.E. 2d 404, 407 (1976), *disc. rev. denied*, 290 N.C. 780, 229 S.E. 2d 35 (1976). Here, while there is evidence that defendants' mother may have been assaulted, there is no evidence whatsoever as to who may have assaulted her. Furthermore, the evidence is clear that the events giving rise to defendants' mother's wounds were considerably removed in time from the events surrounding the death of Robin Darlene Griffin. Accepting, *arguendo*, that an assault or threatened assault on a close relative may provide adequate or legal provocation to arouse heat of passion,¹ the evidence here does not show "anger suddenly² aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice." *State v. Ward*, 286 N.C. 304, 312, 210 S.E. 2d 407, 413 (1974), *modified*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3206 (1976). "The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin." *State v. Ward, supra*, at 313, 210 S.E. 2d at 414. This assignment is without merit and is overruled.

Our examination of the entire record discloses that defendants received a fair trial, free from prejudicial error.

No error.

Judges VAUGHN and MARTIN (Robert) concur.

¹ *State v. Edmundson*, 209 N.C. 716, 184 S.E. 504 (1936) (assault on brother of accused).

² As to the aspect of "sudden" provocation, *see also State v. Patterson*, 297 N.C. 247, 253, 254 S.E. 2d 604, 609 (1979) and *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E. 2d 575, 584 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977).

Nye v. Lipton

CHARLES B. NYE v. HOWARD ALAN LIPTON, ADMINISTRATOR C.T.A. OF THE ESTATE
OF ROBERT I. LIPTON, DECEASED, AND C. PAUL ROBERTS

No. 8014SC362

(Filed 6 January 1981)

1. Principal and Agent § 11— collection of money by attorney-in-fact — failure to make payment to plaintiff — summary judgment proper

In an action to recover the amount of a note from the estate of the borrower's attorney-in-fact, summary judgment was properly entered for plaintiff where plaintiff filed affidavits by witnesses other than himself which were not inherently incredible and were not self-contradictory nor susceptible to conflicting inferences which established that plaintiff made a loan to the borrower in the amount of \$33,000 for which plaintiff took a note from the borrower; the borrower gave written instructions to the attorney-in-fact to pay the \$33,000 to plaintiff from the first monies of the borrower which came to the attorney-in-fact, and the attorney-in-fact agreed to do this; the attorney-in-fact received \$200,000 for the borrower by check dated 11 November 1976; the attorney-in-fact did not pay plaintiff as he had agreed to do; and an affidavit filed by the administrator of the attorney-in-fact which showed \$86,174 had been received by the attorney-in-fact for the borrower between 12 July 1976 and 1 November 1976 and \$8,697 had been paid by the attorney-in-fact to a bank for the plaintiff during that period did not raise a triable issue of fact as plaintiff's uncontradicted affidavit explained that these monies involved a completely separate transaction.

2. Principal and Agent § 11— claims against the principal and agent — claims not inconsistent

In plaintiff's action to recover the amount of a note from the estate of the borrower's attorney-in-fact, the trial court did not err in entering summary judgment against the administrator of the estate of the attorney-in-fact after judgment had been entered against the borrower, since plaintiff was pursuing separate claims growing out of the same transaction; his claim against the borrower was based on a theory that he made a loan to the borrower which had not been paid; plaintiff's claim against the administrator was on the theory that deceased, as attorney-in-fact for the borrower, was under instructions from the borrower to pay the debt to plaintiff, and the deceased failed to pay the debt after receiving funds to do so; these two claims were consistent and plaintiff could pursue both of them; and the payment of either claim would extinguish both.

3. Contracts § 18.2— waiver of contract provisions — insufficiency of evidence

In an action to recover the amount of a note from the estate of the borrower's attorney-in-fact where the evidence tended to show that the borrower gave written instructions to his attorney-in-fact to pay the amount of the loan to plaintiff from the first monies of the borrower which came to the attorney-in-fact, monies came into the hands of the attorney-in-fact, but the attorney-in-fact did not pay plaintiff as he had agreed to do, there was no merit to the argument of defendant administrator that, with full knowledge of plaintiff, the first monies were not paid to plaintiff but

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were applied on behalf of plaintiff to other obligations owed by him to a bank and that by accepting the benefits without protest, plaintiff waived his right to strict compliance with the contract and could not recover damages because of the attorney-in-fact's failure to perform, since all the evidence was that plaintiff insisted throughout the period in controversy that the attorney-in-fact pay him the amount of the loan and there was no evidence that plaintiff agreed that the payment to the bank would be in lieu of the repayment of the loan.

4. Evidence § 11.8— transactions with deceased person — defendant's evidence as opening door

There was no merit to defendant's contention that much of the affidavit testimony upon which the trial court based its decision should have been excluded under G.S. 8-51 as testimony of transactions with a deceased person, since defendant, by offering evidence as to a completely independent transaction, opened the door for plaintiff to give an explanation by his own affidavit.

APPEAL by defendant *Howard Alan Lipton*, Administrator C.T.A. of the estate of *Robert I. Lipton*, from *Jolly, Judge*. Judgment entered 2 November 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 October 1980.

In this action the plaintiff has alleged that the defendants are jointly and severally liable to him. He alleged his claims are based on a note for \$33,000.00 from C. Paul Roberts for a loan made by the plaintiff to Roberts. He alleged further that at the time the note was executed Robert I. Lipton was attorney-in-fact for C. Paul Roberts and was handling Roberts' finances; that Roberts and Lipton represented to plaintiff that Lipton was to receive \$200,000.00 from the sale of a note owned by Roberts, and that plaintiff would be paid from the proceeds of this sale. The plaintiff further alleged that Roberts gave Lipton and Lipton accepted written instructions to pay the plaintiff \$33,000.00 with interest from monies received by Lipton from any source payable to Roberts; that Lipton received the proceeds from the sale of the note for Roberts but did not pay plaintiff.

Roberts did not contest the allegations against him. Summary judgment was entered against Roberts who did not appeal. The defendant Lipton denied the pertinent allegations on information and belief.

Plaintiff moved for summary judgment against Howard Alan Lipton, Administrator, and supported it with affidavits by C. Paul Roberts, Timothy E. Oates, and James M. Ludlow, Jr. Timothy Oates said in his affidavit that on or about 19 November 1976 he was

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working in the law offices of Robert I. Lipton; that he heard Mr. Nye and Mr. Lipton discuss the loan; that Mr. Lipton told Mr. Nye not to worry because he had Mr. Lipton's written promise that he would pay him; that he expected to receive \$200,000.00 for Mr. Roberts from the sale of a note to World Service Life Insurance Company; and that he would pay Mr. Nye from the first monies coming into his possession for the use of Paul Roberts. Mr. Oates further said that he had gone to Texas and returned with a check for \$200,000.00 from the sale of the note, which check was deposited in Mr. Lipton's trustee account. by an amended affidavit, Mr. Oates gave the date for his trip to Texas and return with the check as sometime in November 1976. James Ludlow's affidavit corroborated the affidavit of Timothy Oates. C. Paul Roberts in his affidavit stated essentially the same things that Timothy Oates had said and also stated that Robert I. Lipton did not pay the note. The plaintiff also filed copies of the power of attorney given by C. Paul Roberts to Robert I. Lipton, a note dated 12 July 1976 for \$33,000.00 from C. Paul Roberts to plaintiff, and a letter dated 12 July 1976 from C. Paul Roberts to Robert I. Lipton instructing Mr. Lipton to pay to plaintiff \$33,000.00 from the first monies of Roberts coming into the hands of Mr. Lipton, which letter had been marked "Okay" by Robert I. Lipton.

In opposition to the motion for summary judgment, the appellant filed an affidavit by Stuart Lipton, son of Robert I. Lipton, in which he said the records relating to Robert I. Lipton's legal practice revealed that from 12 July 1976 to 1 November 1976, \$86,174.54 was received on behalf of C. Paul Roberts and \$8,697.20 was paid by Robert I. Lipton to First Union National Bank on behalf of Charles B. Nye from these same funds.

After the affidavit of Stuart S. Lipton was filed, the plaintiff filed his own affidavit and an affidavit by Robert N. Rosenstein. In his affidavit, the plaintiff said that in a transaction unconnected with the transaction in controversy in this case, he had borrowed \$100,000.00 from the First Union National Bank which he lent to C. Paul Roberts; that this was part of a transaction in which several persons had borrowed a total of \$700,000.00 to lend C. Paul Roberts; that Robert I. Lipton was to collect on the loan and make payments of \$2,174.30 per month to the First Union National Bank for the plaintiff; that Robert I. Lipton had made four payments on this loan for a total of \$8,697.20; and that plaintiff had paid the balance due on the note for \$100,000.00

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after the death of Robert I. Lipton. Robert N. Rosenstein stated in his affidavit that he had participated with the plaintiff and several others in borrowing a total of \$700,000.00; that the loans were made at First Union National Bank; that Robert I. Lipton was to repay the loans with funds of C. Paul Roberts; and that Robert I. Lipton had made payments to First Union National Bank on the loans for several months prior to his death. Plaintiff filed a copy of a note he had made to First Union National Bank dated 5 May 1976 in the amount of \$100,000.00 payable in monthly installments of \$2,174.30, which note was marked "paid" on 4 January 1977. He also filed a copy of his check dated 4 May 1976 to C. Paul Roberts in the amount of \$105,000.00, and his check dated 27 December 1976 to First Union National Bank in the amount of \$90,875.02 which was marked "for payment of note in full."

The court allowed the plaintiff's motion for summary judgment. Howard Alan Lipton, Administrator C.T.A., appealed.

Charles B. Nye, pro se, for plaintiff appellee.

Maxwell, Freeman, Beason and Lambe, by James B. Maxwell, and Powe, Porter, Alphin and Whichard, by N. A. Ciompi, for defendant appellant Howard A. Lipton, Administrator C.T.A. of the Estate of Robert I. Lipton, Deceased.

WEBB, Judge.

At the outset we note that the plaintiff, who has the burden of proof, relies on testimonial affidavits to establish there is no genuine issue of a material fact. For a well-reasoned article on this subject, see *Kidd v. Early: Summary Judgment on Testimonial Evidence in North Carolina* by Rebecca Weiant Giles, 55 N.C.L. Rev. 232 (1977). Our Supreme Court has passed on the use of testimonial affidavits on motions for summary judgment in *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). As we read *Kidd*, our Supreme Court holds that G.S. 1A-1, Rule 56 is used to determine whether there is an issue of fact to be tried. If the moving party files papers, including testimonial affidavits which show there is not a triable issue, the opposing party pursuant to Rule 56(e) and (f), must file papers which show there is a triable issue or the moving party will be entitled to summary judgment. The papers filed by the moving party must not be self-contradictory or circumstantially suspicious, and the credibility of a witness must not be inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge,

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or because he has testified as to matters of opinion involving a substantial margin for honest error. There must not be gaps in the evidence and inferences inconsistent with the existence of an essential element may not be made from the testimony.

[1] In the case sub judice, the plaintiff has filed affidavits by witnesses other than himself which are not inherently incredible and are not self-contradictory nor susceptible to conflicting inferences which establish the following facts: (1) plaintiff made a loan to C. Paul Roberts in the amount of \$33,000.00 for which the plaintiff took a note from C. Paul Roberts; (2) C. Paul Roberts gave written instructions to his attorney-in-fact Robert I. Lipton to pay the \$33,000.00 to the plaintiff from the first monies of C. Paul Roberts which came to Robert I. Lipton, and Robert I. Lipton agreed to do this; (3) Robert I. Lipton received \$200,000.00 for C. Paul Roberts by check dated 11 November 1976, and (4) Robert I. Lipton did not pay the plaintiff as he had agreed to do. If these facts are not in issue the plaintiff is entitled to summary judgment. In order to show there was a triable issue, the appellant filed an affidavit which showed \$86,174.54 had been received by Robert I. Lipton for C. Paul Roberts between 12 July 1976 and 1 November 1976 and \$8,697.20 had been paid by Robert I. Lipton to the First Union National Bank for the plaintiff during that period. In explanation of this payment, plaintiff filed his own affidavit as well as the affidavit of Robert N. Rosenstein. Both of these affidavits stated that in a transaction not connected with the subject matter of the case sub judice, the plaintiff and several other persons had borrowed money from the First Union National Bank and invested it in a project of C. Paul Roberts. Robert I. Lipton was to make the note payments for plaintiff and the others and did make several of them before his death. This explanation was uncontradicted.

We hold that the defendant's affidavit does not so contradict the plaintiff's affidavits as to create a triable issue. Defendant's affidavit does not contradict the evidence that Robert I. Lipton received a check for \$200,000.00 dated 11 November 1976. It states that \$8,697.20 was paid to First Union National Bank for plaintiff but does not show why this payment was made. The plaintiff's affidavit and the affidavit of Mr. Rosenstein explain without contradiction that this payment was for a separate transaction. Although the plaintiff is relying on his own affidavit to support in part his explanation of the transaction, the facts he states are not peculiarly within his knowledge. He supports

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his affidavit with documents and the affidavit of Robert N. Rosenstein. We hold that these affidavits and documents establish that there is not a triable issue as to the purpose of the payment of the \$8,697.20 to the First Union National Bank.

[2] The appellant contends it was error to grant the motion for summary judgment against him after judgment was entered against his co-defendant, C. Paul Roberts. The appellant argues that the liability of a principal and agent is in the alternative and both cannot be liable. The appellant cites *Plumbing Co. v. Harris*, 266 N.C. 675, 147 S.E. 2d 202 (1966) and *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375 (1946) for the proposition that the plaintiff elected his remedy by getting a judgment against Roberts, and he cannot now proceed against the administrator. We do not believe either of these two cases is precedent for the case *sub judice*. In *Plumbing Co.*, our Supreme Court held that a suit for breach of contract does not lie against a principal contractor after the subcontractor has secured a lien on the same claim against the landowner on the theory that the contract was made with the landowner. Our Supreme Court would not allow judgments on inconsistent claims. In *Walston*, our Supreme Court affirmed a dismissal as to the agent when the plaintiff sued the principal and agent for breach of warranty. Our Supreme Court held that so long as the agent acted within the scope of his authority he was not liable. In the case *sub judice* the plaintiff is pursuing separate claims growing out of the same transaction. His claim against C. Paul Roberts is based on the theory that he has made a loan to C. Paul Roberts which has not been paid. His claim against the appellant is on the theory that Robert I. Lipton as attorney-in-fact for C. Paul Roberts was under instructions from C. Paul Roberts to pay the debt to plaintiff, and Robert I. Lipton failed to pay the debt after receiving funds to do so. These two claims are consistent and plaintiff may pursue both of them. The payment of either claim will extinguish both.

[3] The appellant next contends there was a triable issue as to waiver by the plaintiff. He argues that Robert I. Lipton was bound by the instructions in the letter to pay "[f]rom the first monies coming into your hands . . . payable to [Roberts]" the amount due under the loan. Appellant argues there is evidence in the record that with the full knowledge of the plaintiff the "first monies" were not paid to plaintiff but were applied on behalf of the plaintiff to other obligations owed by the plaintiff to the First Union National Bank. The appellant contends

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that by accepting the benefits without protest, the plaintiff waived his right to strict compliance with the contract and cannot now recover damages because of Robert I. Lipton's failure to perform. A party may waive a contract right by a voluntary and intentional relinquishment of a known right. See *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1961) and 17A C.J.S. *Contracts* § 514(1) (1963). We hold that there is not sufficient evidence in this case for a jury to find that Charles B. Nye intentionally and knowingly relinquished his right to have Robert I. Lipton pay him the \$33,000.00. All the evidence is that Charles B. Nye insisted throughout the period in controversy that Robert I. Lipton pay him the \$33,000.00. There is no evidence that Charles B. Nye agreed that the payment to First Union National Bank would be in lieu of the repayment of the note for \$33,000.00.

Appellant also contends plaintiff is estopped from getting a judgment against him. Appellant relies on *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979); *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979); *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 222 S.E. 2d 752 (1976). We do not believe any of these cases help the appellant. There is no evidence that the plaintiff has taken inconsistent positions, nor is there any evidence that Robert I. Lipton or the appellant changed his position by relying on representations of the plaintiff. Estoppel does not apply.

[4] The defendant next contends that much of the affidavit testimony upon which the court based its decision should have been excluded under G.S. 8-51 as testimony of transactions with a deceased person. Defendant contends the affidavits of plaintiff and C. Paul Roberts should not have been considered since both were parties to the action and both were interested in the outcome. We believe that the affidavit of Timothy Oates is sufficient to support summary judgment for plaintiff if the defendant had not filed the affidavit in regard to the payments to the First Union National Bank. When the defendant offered evidence as to this transaction, he opened the door for the plaintiff to explain it by his own affidavit. See *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966).

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

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JOHNNIE H. HILL AND WIFE, CLARA MAE F. HILL v. PINELAWN MEMORIAL PARK, INC., WILLIAM C. SHACKELFORD AND WIFE, JENNIE L. SHACKELFORD

No. 808SC364

(Filed 6 January 1981)

1. Evidence § 32.2— parol evidence rule

In an action for breach of contract to convey burial rights in a crypt, testimony by the female plaintiff that Crypt "D" was the subject of negotiations between plaintiffs and defendant did not violate the parol evidence rule where the crypt designation was assigned to the agreement between the parties after it was signed by plaintiffs and was admittedly not an element dealt with in the contract.

2. Limitation of Actions § 4.3— breach of contract action — statute of limitations

Plaintiffs' action for breach of a contract to convey burial rights in a crypt was brought within the three year statute of limitations of G. S. 1-52(1) and (9) where the breach occurred when defendant refused to convey burial rights in a specified crypt to plaintiffs in March of 1977 and the suit was instituted later in March of 1977.

3. Damages §§ 3.4, 17.7— breach of contract — damages for mental anguish — punitive damages

Damages for mental anguish and punitive damages were properly awarded to plaintiffs in an action for breach of contract to convey burial rights in a specified crypt since the evidence was sufficient to show that plaintiffs' contract with defendant involved a personal rather than a commercial subject matter, and the jury found that plaintiffs were defrauded by defendant.

4. Registration § 4— purchasers for value — registration of deed — priority over unrecorded contract to convey

Defendants were purchasers for value of a mausoleum crypt where they paid substantial monies as a down payment and thereafter completed payment of the contract price of \$3,230.14 and, by recording their deed for the crypt, they gained priority under G.S. 47-18(a) over plaintiffs' unrecorded contract to convey the crypt.

APPEAL by defendants from *Lane, Judge*. Judgment entered 12 October 1979 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 October 1980.

This is a civil action brought by plaintiffs Johnnie and Clara Mae Hill against Pinelawn Memorial Park, Inc. and William and Jennie Shackelford wherein they seek damages and specific performance of a contract to convey burial rights in a crypt. Plaintiffs and defendant Pinelawn entered into a Family Protection Agreement in the fall of 1972 whereby Pinelawn agreed to sell and plaintiffs agreed to buy burial rights in a mausoleum crypt. The purchase price was \$2,789.60.

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A promissory note and contract to sell were incorporated into the Family Protection Agreement. The contract, along with other recitations, stated:

Seller will retain security title in the above described property and Seller will convey to Buyer all right, title or interest in the above described property solely for interment purposes, subject at all times to the present rules, regulations and by-laws of the Seller on file in its office and/or such as may be hereinafter adopted, amended, or altered, upon the payment in full of the Promissory Note.

Plaintiffs allege and their evidence tends to show that no letter designation of the crypt involved appeared on the contract, but that they advised Teresa Ingram, the sales representative handling their investment, that they wanted the crypt facing east towards Kinston. Plaintiff Clara Mae Hill testified that she clearly indicated to Teresa Ingram that she wanted the crypt facing the east and Kinston, which she later discovered is designated crypt "D".

Plaintiffs' evidence further indicated that they made regular monthly payments on the note until March of 1977 when they attempted to complete their payments. In a series of letters between plaintiffs' counsel and defendant Pinelawn, plaintiffs were advised that the cemetery's records showed plaintiffs purchasing crypt "C", not crypt "D", and that "D" had been sold to defendants Shackelford.

Defendants Shackelfords' evidence tended to show that they entered into a written agreement with defendant Pinelawn to purchase mausoleum crypt "D" for \$3,230.14 in February of 1974 and completed payment on the contract in February of 1976. Defendants Shackelford requested and received a deed to crypt "D" after being served with a summons in this action and discovering they did not have a deed. This deed was recorded on 9 September 1977. Defendant William Shackelford testified he and his wife did not know the plaintiffs or know that plaintiffs were purchasing a crypt from defendant Pinelawn until they were served with notice of this suit in the fall of 1977.

Defendant Pinelawn's evidence tended to show that plaintiffs requested crypt "C" not crypt "D", and that they sold defendants Shackelford the only available crypt in February of 1974. Defendant Pinelawn introduced documents concerning plaintiffs' purchase bear-

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ing the crypt designation "C", but through their own witness established that in the usual course of business at Pinelawn specific grave sites or crypt designations are placed on the Family Protection Agreements by an office administrator after the purchaser signs the contract.

The complaint alleged breach of contract by Pinelawn by refusing to convey crypt "D" to plaintiffs, fraud on the part of Pinelawn and a conspiracy between Pinelawn and the Shackelfords to deprive plaintiffs of their rights to crypt "D". Plaintiffs also alleged that defendants Shackelford interfered with their contract with Pinelawn. Plaintiffs sought relief in the form of specific performance or a return of the monies paid on the contract from Pinelawn, compensatory and punitive damages from both Pinelawn and the Shackelfords, and a conveyance of the burial rights in crypt "D" from the Shackelfords.

Both Pinelawn and Shackelfords' motions for directed verdict were denied and the judge directed the jury to answer Issue #6 in the negative. The issues submitted and the answers by the jury were as follows:

1. Did Defendant Pinelawn Memorial Park, Inc., agree with Plaintiffs to convey to Plaintiffs Crypt "D"?

Yes.

2. If so, did Defendant Pinelawn Memorial Park, Inc., fail to perform the agreement to convey Crypt "D" to Plaintiffs?

Yes.

3. What amount, if any, are Plaintiffs entitled to recover of Defendant Pinelawn Memorial Park, Inc., for breach of contract?

\$100.00.

4. Did the Defendant Pinelawn Memorial Park, Inc., defraud the Plaintiffs?

Yes.

5. If so, what amount of punitive damages are Plaintiffs entitled to recover of Defendant Pinelawn Memorial Park, Inc.?

\$10,800.00.

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6. Were the Defendants Shackelfords innocent purchasers for value?

No.

7. Did Defendant William C. Shackelford wrongfully interfere with the contractual relationship between Plaintiffs and Defendant Pinelawn Memorial Park, Inc.?

No.

8. If so, what amount of damages, if any, are Plaintiffs entitled to recover from Defendant William C. Shackelford?

0.

9. What amount of punitive damages, if any, are Plaintiffs entitled to recover from Defendant William C. Shackelford?

0.

Based on the jury's answers to the issues, the trial judge ordered:

1. Defendant Pinelawn Memorial Park, Inc., shall execute and deliver to Plaintiffs a warranty deed conveying Crypt "D" of the Garden of Eternal Light in Pinelawn Memorial Park, Inc., as more particularly described in Deed Book 710 at Page 176 of the Lenoir County Registry.

2. The Defendants Shackelfords shall execute and deliver to Plaintiffs a Quitclaim Deed conveying Crypt "D" of the Garden of Eternal Light in Pinelawn Memorial Park, Inc., or more particularly described in Deed Book 710 at Page 176 of the Lenoir County Registry.

3. The Defendant Pinelawn Memorial Park shall pay to Defendants Shackelford all sums of money heretofore paid by the Shackelfords to the Defendant Pinelawn Memorial Park for the purchase of Crypt "D".

4. The Plaintiffs shall pay to Defendant Pinelawn Memorial Park the sum of \$152.97 representing the balance of the purchase price as provided in the contract dated October 13, 1972.

5. The Defendant Pinelawn Memorial Park, Inc., shall pay to Plaintiffs the sum of \$100.00 as damages for the

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breach of a contract dated October 13, 1973.

6. The Defendant Pinelawn Memorial Park, Inc., shall pay to Plaintiffs the sum of \$10,800.00 as punitive damages.

7. The costs of this action are taxed against the Defendant Pinelawn Memorial Park, Inc.

8. All liens, judgments, mortgages, deeds of trust, and encumbrances whatsoever which have been filed against the real property described in Deed Book 710 at Page 176 of the Lenoir County Registry by any person, firm, or corporation (other than the Plaintiffs herein) since April 25, 1977, are hereby declared null and void and are cancelled of record.

9. The payment of the balance of the purchase price as ordered herein in Paragraph 4 above, and the execution and delivery of the deed as required herein above in Paragraph 1 and 2 shall be complied with within thirty (30) days after the filing of this Judgment in the Clerk of Court's office in Lenoir County, North Carolina.

10. A true copy of this Judgment shall be certified by the Clerk of Superior Court of Lenoir County and delivered by him to the Register of Deeds of Lenoir County who shall then record and index same in the Register of Deeds office in the manner by law prescribed.

Defendants Pinelawn and Shackelfords appeal.

Marcus & Whitley, by Harvey W. Marcus and Robert E. Whitley, for plaintiff appellees.

Jeffress, Morris & Rochelle, by A. H. Jeffress, for defendant appellant Pinelawn Memorial Park, Inc.

Fred W. Harrison for defendant appellants William and Jennie Shackelford.

ARNOLD, Judge.

[1] In their first assignment of error, defendant Pinelawn challenges the testimony of plaintiff Clara Mae Hill that crypt "D" was the subject of negotiations between plaintiffs and defendant Pinelawn.

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Pinelawn asserts this testimony violated the parol evidence rule and should have been excluded at trial. However, Pinelawn overlooks the fact that a defense witness, Charles Lynn, testified that in the ordinary course of business a crypt designation would have been assigned to the Family Protection Agreement by the office administrator after it was signed by the plaintiffs. In light of the fact that the crypt designation was admittedly not an element dealt with in the contract, the evidence by plaintiff Clara Mae Hill as to which crypt she indicated she wanted was not barred by the parol evidence rule. *See, Metropolitan Furniture Leasing, Inc. v. Horne*, 29 N.C. App. 400, 224 S.E. 2d 305 (1976).

Equally without merit is Pinelawn's argument that inadmissible hearsay was admitted by Clara Mae Hill concerning her conversation with Patricia Grant, a former employee of Pinelawn. The testimony concerned Patricia Grant's statement, "uh oh, Mrs. Hill, somebody has played a switch-a-roo on you." The same evidence was subsequently allowed without objection when Patricia Grant testified that she telephoned Mrs. Hill and "... told her that a switch had been made" By failing to object when evidence of the same import was later admitted defendant Pinelawn waived its exception to the admission of the evidence. Therefore, we find no prejudicial error.

Defendant Pinelawn's assertion that plaintiffs' claim for specific performance of the Family Protection Agreement should have been dismissed is well taken. As discussed subsequently in this opinion in regard to defendants Shackelfords' appeal, Pinelawn has no interest in crypt "D" which they can be directed to convey to the Hills, therefore, defendant Pinelawn's motion to dismiss plaintiffs' specific performance claim should have been granted.

[2] Pinelawn's challenge to this action on the basis of the three-year statute of limitations is incorrect. N.C.G.S. 1-52(1) and (9). The statutory period begins to run on the date the promise is broken or the breach occurs. *Ready Mix Concrete v. Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978). The breach of promise occurred in this case when Pinelawn refused to convey burial rights in crypt "D" to plaintiffs in March of 1977. The suit was brought later in March of 1977, well within the three-year statute of limitations.

[3] Next, Pinelawn requests that damage awards be overturned on the rationale that neither damages for mental anguish nor punitive

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damages are proper in a breach of contract case. However, *Carroll v. Rountree*, 34 N.C. App. 167, 237 S.E. 2d 566 (1977), *aff'd on rehearing*, 36 N.C. App. 156, 243 S.E. 2d 821, *discr. rev. denied*, 295 N.C. 549, 248 S.E. 2d 725 (1978), recognized the propriety of damages for mental anguish in breach of contract cases when "the subject matter of the contract was of a personal rather than commercial nature." *Id.* at 174, 237 S.E. 2d at 572. Sufficient evidence was presented to establish that plaintiffs' contract with Pinelawn involved a personal rather than commercial subject matter. Moreover, our courts have recognized that in breach of contract actions, "with substantial tort overtones emanating from the fraud and deceit" of the defendant, punitive damages may be proper. *Oestreich v. American National Stores, Inc.*, 290 N.C. 118, 136, 225 S.E. 2d 797, 809 (1976); *Carroll, supra*.

Finally, Pinelawn's motion for a mistrial pursuant to an improper question asked by plaintiffs' counsel was properly denied by the trial judge. The judge admonished the jury to disregard the question following objection by counsel for Pinelawn. We do not feel that Pinelawn was unduly prejudiced by the asking of the question, especially in light of the judge's instruction that the jury disregard the question.

Defendants Shackelford assign as error several rulings on motions concerning evidence presented at trial. In light of the fact that the jury found every issue except number six in favor of the Shackelfords, the rulings could not be prejudicial to their case.

[4] The Shackelfords' other assignment of error attacked the judge's direction to the jury that they answer Issue #6 in the negative as to whether the Shackelfords were purchasers for value. The trial judge apparently made this ruling based on the fact that defendants Shackelford had actual notice of this action prior to receiving and recording of their deed to crypt "D". Both parties say that the issue depends upon when defendants acquired a protected interest in the crypt.

Our recording statute, N.C.G.S. 47-18 clearly states: "(a) No (i) conveyance of land, or (ii) contract to convey . . . shall be valid to pass any property interest as against . . . purchasers for a valuable consideration from the . . . bargainor . . . but from the time of registration thereof in the county where the land lies" North Carolina's statute creates a "race to the courthouse" to determine priority between purchasers for value from the grantor. J. Webster, *Real Estate*

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Law in North Carolina § 331 (1971). Therefore, "no notice however full or formal, will supply the want of registration of a deed" or contract to convey. *Id.* and cases cited therein.

Defendants Shackelford were purchasers for value as evidenced by the record, since it is undisputed that the Shackelfords paid substantial monies as a down payment. Shackelfords, by recording their deed from Pinelawn for crypt "D", gained priority under the statute over plaintiffs' unrecorded contract to convey. N.C.G.S. 47-18(a); *Henry v. Shore*, 18 N.C. App. 463, 197 S.E. 2d 270 (1973). The Shackelfords were entitled to a directed verdict in their favor on Issue #6 in light of the statute, thus, the trial court erred in answering that issue in plaintiffs favor.

For the reasons discussed above: the judgment as to the Shackelfords is reversed, the judgment as to the punitive damages against defendant Pinelawn is affirmed, and otherwise as to Pinelawn the judgment is vacated and remanded to the trial court for entry of judgment of compensatory damages for the money paid by plaintiffs to defendant Pinelawn pursuant to the contract to purchase plus the \$100 awarded by the jury.

No error in part.

Reversed and Remanded in part.

Judges MARTIN (Harry C.) and HILL concur.

BURKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION v. JUNO
CONSTRUCTION CORPORATION AND STATESVILLE ROOFING & HEATING
COMPANY

No. 8025SC432

(Filed 6 January 1981)

1. Appeal and Error § 32— objection to issue — waiver

Plaintiff waived its objection to the trial court's framing of the third issue submitted to the jury since plaintiff did not object to that issue at trial nor did it request a different issue.

2. Professions and Occupations § 1; Contracts § 21.2— installation of roof —causes of damages —instructions proper

Where a contractor is required to and does comply with the plans and speci-

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cations prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications, and the trial court, in an action to recover for damages allegedly resulting from defendants' failure properly to install a roof on a school, properly instructed the jury to that effect.

3. Professions and Occupations § 1; Contracts § 21.2 — roof installation — repair of defects — jury instruction improper

In an action to recover damages allegedly resulting from defendants' failure to install properly a roof on a high school where the subcontractor agreed to repair defects in the roof under the terms of his agreement to maintain roofing, the trial court erred in determining that the jury's answer to the third issue, whether defects in the roof resulted from deficiencies in the design and specifications for the roof provided by plaintiff's architect, barred plaintiff from recovering any damages from defendant's subcontractor under its maintenance agreement.

4. Architects § 3; Contracts § 21.2— defective roof — architect's final certificate no bar to action

In plaintiff's action to recover damages allegedly resulting from defendant's failure to install properly a roof on a high school, there was no merit to defendants' contention that plaintiff's claims were barred by the issuance of the architect's final certification of completion and the resulting final payment by plaintiff to defendant contractor of the contract price since the contract between the parties did not contain a provision making the architect's final certificate conclusive as to the performance of the work in accordance with the contract provisions, but instead had provisions for the use of arbitration in event of disputes between the owner and the contractor.

5. Rules of Civil Procedure § 15.1— amendment of complaint — denial of motion proper

The trial court did not err in denying defendant's subcontractor's motion to amend its pleadings to allege that an agreement to maintain a roof was unenforceable, since the motion was first made at the conclusion of all the evidence, and defendant did not show an abuse of the trial court's discretion in denying the motion.

APPEAL by plaintiff from *Snepp, Judge*. Judgment signed 1 December 1979 in Superior Court, BURKE County. Heard in the Court of Appeals 4 November 1980.

Plaintiff brought this action for damages, alleging defendants failed to install properly the roof on Freedom High School in Burke County. Plaintiff had contracted with the architectural firm of The Shaver Partnership for the design of the school. The defendant Juno Construction Corporation was the general contractor, and it subcontracted the roofing work to the defendant Statesville Roofing & Heating Company. Statesville entered into an "Agreement to Maintain Roofing," as required by the contract.

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The following issues were submitted to the jury and answered as indicated:

1. Did the defendant, Juno Construction Corporation, breach its contract with the plaintiff, Board of Education?

Answer: Yes

2. Did the defendant, Statesville Roofing and Heating Company, breach its agreement with the plaintiff, Board of Education?

Answer: Yes

3. Did damage to the roof of the plaintiff's building result solely from deficiency in the design of and in the specifications for the project furnished Juno Construction Corporation by the plaintiff, Board of Education?

Answer: Yes

4. What amount is the plaintiff entitled to recover of the defendants?

Answer: —

Based upon this verdict, the court entered judgment denying any recovery to plaintiff, and from this judgment, plaintiff appeals.

Simpson, Aycock & Beyer, by Dan R. Simpson, Samuel E. Aycock and Louis E. Vinay, Jr., for plaintiff appellant.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, for defendant appellee Statesville Roofing & Heating Company, and Miller, Johnston, Taylor & Allison, by John B. Taylor, for defendant appellee Juno Construction Corporation.

MARTIN (Harry C.), Judge.

[1] Appellant argues two assignments of error before this Court. Plaintiff contends the trial court committed error in the framing of the third issue submitted to the jury, and in charging the jury on that issue.

The pretrial order contains a reference to exhibits F, G, and H as being the issues that plaintiff and defendants contend are to be ans-

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wered by the jury. Exhibits F, G, and H are not in the record on appeal. Appellant did not object to the wording of the third issue, did not object to that issue's being submitted to the jury, and did not tender any issues to the court.

A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E.2d 731 (1961); 1 McIntosh, North Carolina Practice and Procedure (2d ed. 1956), § 1353.

Hendrix v. Casualty Co., 44 N.C. App. 464, 467, 261 S.E.2d 270, 272-73 (1980). Because plaintiff neither objected to the third issue submitted to the jury nor requested a different issue, it cannot do so on this appeal.

[2] Plaintiff further insists the court erred in its instructions to the jury on the third issue. Although we find no North Carolina case directly on point, the law in general is that where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications. *United States v. Spearin*, 248 U.S. 132, 63 L. Ed. 166 (1918); 13 Am. Jur. 2d Building, Etc. Contracts § 28 (1964); Annot., 88 A.L.R. 797 (1934). The North Carolina Supreme Court, in *Construction Co. v. Housing Authority*, 244 N.C. 261, 93 S.E. 2d 98 (1956), held that allegations of plaintiff contractor that it constructed floor slabs in accordance with plans and specifications provided by defendant's architect and that the slabs settled through no fault of plaintiff, and that plaintiff was required to correct the settling, were sufficient to state a cause of action, at least for the purposes of allowing a motion for discovery. Although the precise question was not presented in *Construction Co.*, it is persuasive authority for adoption of the general rule above stated, and we so do.

Where the contractor does not comply with the plans and specifications provided by the owner, notwithstanding the fact that they are defective, the contractor proceeds at his peril, assuming the risk of

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any deviations from the plans and guaranteeing the suitability of the work. Annot., 6 A.L.R.3d 1394, 1415 (1966).

Here, the trial judge instructed the jury on the first issue:

[I]f the plaintiff has satisfied you by the greater weight of the evidence that Juno, acting through its subcontract with Statesville, failed to comply with the conditions and specifications of the contract, in that it applied bitumen in such a manner that foaming resulted, or that it used insulation materials which had been allowed to become wet which resulted in the same effect, or that it failed to provide plaintiff with watertight roofing which would not deteriorate excessively, and would perform without fail under normal conditions and with normal maintenance for twenty years after final acceptance, then it would be your duty to answer the first issue yes.

The jury answered this issue "yes," and could only do so upon a finding by it that defendant Juno had failed to comply with the plans and specifications of the architect for the construction of the roof. However, to recover damages for breach of contract, plaintiff must also prove that the breach by Juno contributed to the damages sustained by plaintiff. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). "Damages for injury that follows the breach in the usual course of events are always recoverable provided the plaintiff proves that such injury actually occurred as a result of the breach." *Id.* at 187, 254 S.E.2d at 616. Issue No. 1 does not present the question of causation. That question is contained in the third issue.

In this appeal, the primary dispute is not whether defendants breached their contract, but whether their breach caused the damages to the roof of plaintiff's building. Defendants contended and produced evidence that the damages to the roof were caused solely by defective designs of the architect. In this case, the court required the defendants to carry the burden of proof on the question of causation. The defendants carried that burden, and the jury resolved the issue of causation in their favor. We find no error in the court's instructions on the third issue.

[3] The record establishes that defendant Statesville executed an "Agreement to Maintain Roofing" which required Statesville, for a period of five years after 6 August 1973, to make permanent repairs to

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the roof or to restore it to the quality standards originally specified. The specifications required that the roof be watertight. Plaintiff contended Statesville failed to perform under its agreement to maintain the roof. This question was submitted to the jury in the second issue and answered by it, "yes." On this issue, the court instructed the jury:

[I]f the plaintiff has satisfied you by the greater weight of the evidence that the defendant, Statesville, failed to make permanent repairs at its own expense to the roof which were required because of the failure of materials or workmanship which resulted in the defects of the roofing, you will answer the second issue yes.

The third issue and the jury's answer did not relate to the second issue. The court charged the jury on the third issue:

[I]f the defendants have satisfied you by the greater weight of the evidence that defects in the roof of Freedom High School resulted solely from deficiencies in the design of and in the specifications for the project furnished to Juno by the plaintiff's architect so that if Juno had performed its work strictly in accordance with the plans and specifications the defects would have occurred, then you will answer this issue yes.

The third issue is concerned with the cause of defects in the roof, whereas the second issue is concerned with the failure of defendant Statesville to properly repair those defects under the terms of its agreement to maintain roofing. Under the terms of the agreement, defendant Statesville agrees "to make such temporary and permanent repairs *without reference to or consideration of the cause or the nature of the leaks or defects* in the roofing and associated work." (Emphasis added.) The trial court erred in its determination that the jury's answer to the third issue barred plaintiff from any damages from defendant Statesville.

Plaintiff further contends it was entitled to a directed verdict as to the question of liability of defendants at the close of all the evidence. It argues that defendants, by offering into evidence plaintiff's complaint against its architect, The Shaver Partnership, admitted they violated the contract in the respects alleged in paragraph 12 of that complaint. Such is not the case. The complaint is only evidence that plaintiff *alleges* defendants breached the contract in the manner set out. The argument is specious.

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[4] Defendants, by cross-assignment of error, argue that their motion for directed verdict at the close of plaintiff's evidence should have been granted. They state that plaintiff's claims are barred by the issuance of the architect's final certificate of completion and the resulting final payment by plaintiff to defendant Juno of the contract price. The roof was completed 19 June 1973, and the final certificate issued 8 November 1973.

Where the contract between the parties makes the final certificate of the architect conclusive as to the completion of the work in accordance with the contract, the parties may not question it or impeach it as to observable defects or those which were or could have been discovered by the architect in the proper performance of his duties, except in cases of fraud or mistake so substantial as to indicate bad faith or gross neglect. *Heating Co. v. Board of Education*, 268 N.C. 85, 150 S.E.2d 65 (1966). This appears to be the general law. See 13 Am. Jur. 2d Building, Etc. Contracts § 34 (1964). It is otherwise where the agreements do not indicate that the architect's final certificate shall be conclusive. *Id.*

The contract between the parties does not contain a provision making the architect's final certificate conclusive as to the performance of the work in accord with the contract provisions. Rather, it has provisions for the use of arbitration in the event of disputes between the owner and the contractor.

The contract does contain the following:

9.7.5 The making of final payment shall constitute a waiver of all claims by the Owner except those arising from:

- .1 unsettled liens,
- .2 faulty or defective Work appearing after Substantial Completion,
- .3 failure of the Work to comply with the requirements of the Contract Documents, or
- .4 terms of any special guarantees required by the Contract Documents.

Obviously, this provision does not bar the plaintiff with respect to the claims alleged in this litigation. The court properly denied defendants' motion for directed verdict.

[5] Defendant Statesville's further contention, that the agreement to maintain the roof is unenforceable and that the court committed

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prejudicial error in denying its motion to amend its pleadings to so allege, is untenable. The motion was first made at the conclusion of all the evidence. The trial court has great discretion in deciding motions to amend pleadings, and when such motions are made during trial, its decision is not appealable in the absence of palpable abuse. *Tyndall v. Tyndall*, 270 N.C. 106, 153 S.E.2d 819 (1967); *Chappel v. Winslow*, 258 N.C. 617, 129 S.E.2d 101 (1963); *Hill v. Shanks*, 6 N.C. App. 255, 170 S.E.2d 116, *cert. denied*, 275 N.C. 681 (1969). No manifest abuse of discretion has been made to appear in this case.

The result is: the judgment is affirmed as to the defendant Juno Construction Corporation. The judgment is vacated and the cause remanded to the Superior Court of Burke County for determination of the issue of damages as to the defendant Statesville Roofing & Heating Company.

Affirmed in part, vacated and remanded in part.

Chief Judge MORRIS and Judge WEBB concur.

WILLIAM J. MABRY, JR. v. FULLER-SHUWAYER CO., LTD.

No. 8026SC508

(Filed 6 January 1981)

Constitutional Law § 24.6; Process § 14.3— personal jurisdiction over foreign corporation — minimum contacts with N.C.

In an action to recover damages for breach of an employment contract, defendant foreign corporation had sufficient minimum contacts with N. C. to subject it to the *in personam* jurisdiction of our courts under G.S. 1-75.4 (1)(d), G.S. 55-145 (a)(2), and the Due Process clause of the Fourteenth Amendment where defendant's agents at least twice solicited applications for employment by advertising in a newspaper of wide circulation in this State; defendant's agents on two occasions came into this State to recruit employees for defendant, at which time they used State roads and air facilities owned and operated by the State or municipalities therein; on both trips into this State defendant's agents rented and occupied rooms in hotels licensed and regulated by the State; defendant's agents carried on long distance telephone conversations with an indeterminate number of residents of this State; defendant's agents met with and interviewed as many as 62 N. C. residents while in Charlotte; defendant's agents sent through the mail approximately 28 letters containing conditional offers of employment which N. C. residents received at their homes; defendant's agent employed at least 19 of these 28 N. C. residents; the residents employed were flown from N.C. to N. Y. at defendant's expense to sign employment contracts; and plaintiff was a resident of N. C. at the time he entered into an employment contract with defendant.

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APPEAL by defendant from *Burroughs, Judge*. Order entered 7 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 December 1980.

This is an action for damages for breach of an employment contract. The plaintiff is a resident of North Carolina and the defendant is a foreign corporation organized under the laws of Saudi Arabia. Service upon the defendant was made by delivering a copy of the summons and complaint by certified mail to an agent of the defendant at its address in New York.

Defendant Fuller-Shuwayer Co., Ltd. is a construction company involved in various projects in Saudi Arabia. The company is a limited liability association existing by virtue of a memorandum of association and has no office or registered agent in the United States. Seventy percent of the association is owned by George A. Fuller Company, a division of the Northrop Corporation of California and thirty percent is owned by Abdullah Al-Hamoud Al-Shuwayer of Saudi Arabia. In an order entered 17 August 1979, defendant was found to have vested in George A. Fuller Company, "broad executive responsibility on a continuing basis" for the hiring of employees to work for defendant. Defendant has not appealed from that order and does not contest the authority of George A. Fuller Company to act on its behalf. Defendant does, however, contest the *in personam* jurisdiction of the North Carolina Courts based on the limited activities in this State of defendant's agent, George A. Fuller Company. On 5 September 1979 defendant moved pursuant to G.S. 1A-1, Rule 12(b)(2) for dismissal of plaintiff's complaint.

At the hearing on this motion, a review of the pleadings, the exhibits attached thereto, several affidavits, and the answers to the plaintiff's interrogatories, revealed uncontroverted facts as follows:

On 22 January 1978, defendant advertised in the Charlotte Observer for employees to work in Saudi Arabia listing the telephone number of George A. Fuller Company in New York City to call for information. Plaintiff called that number and was advised that on a certain date defendant would have a representative at a Charlotte hotel to interview prospective employees. Plaintiff was invited to attend. He appeared along with several other prospective employees and was interviewed on that date. An employee for the George A. Fuller Company interviewed the prospective employees in his hotel room explaining to them the terms of the employment contract of

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Fuller-Shuwayer Co., Ltd. On 9 February 1978, George A. Fuller Company, acting for defendant, wrote plaintiff at his residence in Concord, and conditionally offered to enter into an employment contract with him provided that he, "meet the qualification for the position as established by George A. Fuller Company" and that he "[be] found physically qualified." Subsequently, plaintiff was flown to New York City by an air ticket paid for by defendant through George A. Fuller Company. From the airport defendant transported him to the New York City offices of George A. Fuller Company, 595 Madison Avenue. While plaintiff was in New York City he was given a physical examination by the Life Extension Institute. The physical examination was arranged and paid for by George A. Fuller Company and was a condition of plaintiff's entering into an employment contract with defendant. While plaintiff was in New York, he signed the employment contract which is the subject of this action. Defendant's answers to plaintiff's interrogatories indicate that this was the only time in 1978 that defendant's agent recruited in North Carolina and that on this trip twenty-two people were interviewed and eight were favorably considered for employment. Defendant states that the records of George A. Fuller Company do not indicate how many of these eight applicants actually signed employment contracts. The affidavit of the George A. Fuller Company employee who actually conducted the interviews indicated he interviewed "approximately 15 people in Charlotte" and approved "at least five applicants."

On at least one prior occasion defendant had come to North Carolina through its agent, George A. Fuller Company, to advertise and recruit North Carolina residents to sign contracts to work in Saudi Arabia. The affidavit of a second George A. Fuller Company employee indicates that in 1975 he conducted a recruiting excursion into North Carolina much like the 1978 excursion to which plaintiff responded. This employee states in his affidavit that the decision to employ an applicant was made immediately after the interview was completed and that "the rest was merely form." That decision was made in Charlotte, North Carolina. The formal offers were delivered by defendant to successful applicants at their North Carolina homes though each was subsequently transported by defendant to New York for the formal signing of the employment contract. The 1975 excursion into North Carolina resulted in interviews with approximately 40 North Carolina residents and contracts with approximately 18.

The defendant appeals from the order denying its motion to

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dismiss for lack of *in personam* jurisdiction.

Perry, Patrick, Farmer & Michaux by Roy H. Michaux, Jr. for defendant appellant.

Ronald Williams for plaintiff appellee.

CLARK, Judge.

The sole issue before this Court is whether the courts of this State may properly exercise jurisdiction over the defendant. Two considerations determine whether a state court's exercise of *in personam* jurisdiction over a foreign defendant is proper: (1) whether the legislature has granted to the courts the statutory authority to exercise its jurisdiction over the defendant under the circumstances, and (2) whether under the facts and circumstances of the case the exercise of jurisdiction comports with the due process limitations imposed on the states by the Fourteenth Amendment. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

The first of these considerations is easily met. G.S. 1-75.4 (1) (d) grants jurisdiction over any defendant who, at the time of service of process upon him, "[i]s engaged in substantial activity within this State . . ." G.S. 55-145 (a) (2) grants jurisdiction over foreign corporations not transacting business in this State on any cause of action arising "[o]ut of any business solicited in this State . . . if the corporation has repeatedly so solicited business . . ."

Rather than argue the applicability of these statutes, defendant concedes that these statutes

"reflect a legislative intent to extend jurisdiction of the North Carolina courts to the fullest extent permissible under the due process clause of the United States Constitution, *Pope v. Pope*, 38 N.C. App. 328, 248 S.E. 2d 260 (1978); *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Therefore, the North Carolina courts have greatly simplified the first step in the test by interpreting section 1-75.4 (1) (d) to apply to *any* defendant who meets the 'minimum contacts' requirement of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), which is the yard stick used by the courts in determining step two of the test - the constitutionality of the statute as applied. *Fieldcrest Mills, Inc. v. Mohasco Corpora-*

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tion, 442 F. Supp. 424 (D.C. N.C. 1977)."

We agree with defendant that the intent of the legislature was to assert personal jurisdiction to the fullest extent allowed by due process. See *Stephenson v. Jordan Volkswagen, Inc.*, 428 F. Supp. 195 (W.D. N.C. 1977); *Sparrow v. Goodman*, 376 F. Supp. 1268 (W.D. N.C. 1974); *Forman & Zuckerman v. Schupak*, 31 N.C. App. 62, 228 S.E. 2d 503 (1976), appeal dismissed, 434 U.S. 804, 54 L. Ed. 2d 61, 98 S. Ct. 32 (1977); *Bank v. Funding Corp.*, 30 N.C. App. 172, 226 S.E. 2d 527 (1976); *Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973). The only meaningful consideration, then, is whether the acts of defendant in North Carolina constituted sufficient minimum contacts with the State to subject it to the *in personam* jurisdiction of our courts.

In this second consideration, we must be guided by a trilogy of cases in which the United States Supreme Court has defined the due process limitations on the States' exercise of *in personam* jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945), the high court laid down the rule that before a state court may subject a non-resident defendant to a judgment *in personam*, "certain minimum contacts" with the forum state must be established in order that maintenance of the suit not "offend traditional notions of fair play and substantial justice." In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), the Court upheld California's exercise of *in personam* jurisdiction over a foreign insurance company, finding minimum contacts on the basis of a single contract of insurance which was delivered to insured in California, it appearing that insured mailed premiums to defendant from California and that insured was a California resident when he died. This very liberal recognition of extended personal jurisdiction was limited the following year by the U. S. Supreme Court's holding in *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228, reh. denied, 358 U.S. 858, 3 L. Ed. 2d 92, 79 S. Ct. 10 (1958), in which the Court explained that the minimum contacts must properly be contacts brought about by the defendant:

"The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

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Id. at 253-54, 2 L. Ed. 2d at 1298, 78 S. Ct. at 1239-40.

Our own Supreme Court in recognizing and following the rules of the above three cases has stated:

“Whether the type of activity conducted within the State is adequate to satisfy the requirements depends upon the facts of the particular case. (Citations omitted.) It seems, according to the most recent decisions of the United States Supreme Court, that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. . . .”

Farmer v. Ferris, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963), *quoted in Dillon v. Numismatic Funding Corp.*, 291 N.C. at 679, 231 S.E. 2d at 632.

In the instant case, plaintiff is a resident of North Carolina, requiring less extensive contacts than would be necessary if plaintiff were a stranger to the forum state, *Lee v. Walworth Valve Co.*, 482 F. 2d 297 (4th Cir. 1973); and there is no hint of forum shopping, *Dillon v. Numismatic Funding Corp.*, 291 N.C. at 679, 231 S.E. 2d at 632. We note too that “[w]hen claims are . . . moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum”; thus by denying plaintiff access to our courts, we might well be placing defendant beyond the reach of the plaintiff. *Byham v. National Cibo House*, 265 N.C. 50, 57, 143 S.E. 2d 225, 231-32, 23 A.L.R. 3d 537, 546 (1965).

We hold that in this case, there were sufficient contacts between the defendant and the State of North Carolina, all of which were initiated by the defendant through its agent, to satisfy the traditional due process requirements of fair play and substantial justice. Our holding is based on the following circumstances:

1) Defendant’s agent at least twice solicited applications for employment by advertising in a newspaper of wide circulation in this State.

2) Defendant’s agent’s employees on two different occasions came into the State to conduct their recruitments, at which time they availed themselves of the use of state roads and/or air facilities owned and operated by the State or municipalities therein.

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3) On both trips into the State, defendant's agent's employees rented and occupied rooms in hotels licensed by and regulated by the State.

4) Defendant's agents carried on long distance telephone conversations with an indeterminate number of residents.

5) Defendant's agents met with and interviewed as many as 62 North Carolina residents while in Charlotte.

6) Defendant's agents apparently sent through the mails approximately 28 letters containing "conditional offers of employment" which North Carolina residents received at their homes. (This was definitely the procedure followed for the 20 of the 28 who were offered employment in 1975; the employee who conducted the 1978 interviews indicates in his affidavit that a "conditional offer" was made to eight residents by telephone. We note, however, that the record contains a letter signed by this employee which was sent to plaintiff at his home in Concord.)

7) Defendant's agents employed at least 19 of these 28 North Carolina residents.

8) Those residents employed were flown from North Carolina to New York at the employer's expense to sign employment contracts before leaving for Saudi Arabia.

We find persuasive the fact that the contract upon which this action for breach is based, while not finally consummated in this State, arose out of solicitations and was substantially negotiated here. "[S]o far as . . . obligations arise out of or are connected with the activities [of a foreign corporation] within the [forum] state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *International Shoe Co. v. Washington*, 326 U.S. at 319, 90 L. Ed. at 104, 66 S. Ct. at 160, 161 A.L.R. at 1063.

The order of 7 February 1980 is

Affirmed.

Judges HEDRICK and WHICHARD concur.

Waters v. Phosphate Corp.

PAUL R. WATERS AND WIFE, ALMA M. WATERS, AND WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER THE WILL OF JAMES A. TINGLE, DECEASED V. NORTH CAROLINA PHOSPHATE CORPORATION, DAVID B. ALLEMAN AND WIFE, RUTH G. ALLEMAN AND ELIZABETH KEYS ALLEMAN WHEELER (DIVORCED)

No. 803SC401

(Filed 6 January 1981)

1. Vendor and Purchaser § 5— action to compel purchase of property — ketable title

In an action to compel the corporate defendant to purchase property from plaintiffs in accordance with the parties' purchase contract, there was no merit to defendant's contention that the trial court was correct in granting its motion for directed verdict because plaintiffs' title was unmarketable on the date of the closing due to the presence of a reverter clause in the deed from plaintiffs' predecessor since it had been judicially determined that the language in the deed from plaintiffs' predecessor was insufficient to create a condition subsequent with a right of reentry.

2. Vendor and Purchaser § 4— action to compel purchase of property — easement not satisfactory to defendant — jury question

In an action to compel the corporate defendant to purchase property from plaintiffs in accordance with the parties' purchase contract where defendant alleged that a utility easement across the subject property constituted an encumbrance not satisfactory to it and rendered plaintiffs' title unmarketable, the question of whether the utility easement was of a visible, open and notorious nature was a question of fact for the jury to decide based on the evidence presented at trial; if the easement was found by the jury to be a visible easement, defendant would be deemed to have entered the contract to convey intending to take subject to the easement and defendant could not assert the easement as a reason to refuse to perform the contract; and it was therefore error for the trial court to grant defendant's motion for a directed verdict on this ground.

3. Vendor and Purchaser § 4— action to compel purchase of land — unsatisfactory encumbrance on land — directed verdict improper

In an action to compel corporate defendant to purchase property from plaintiffs in accordance with the parties' purchase contract where defendant alleged that a judgment creating a canal corporation created a lien on the subject property which constituted an encumbrance unsatisfactory to it and rendered plaintiffs' title unmarketable, the trial court erred in directing verdict in defendant's favor on this ground, since the judgment creating a canal corporation was not entered into evidence at trial; there was no indication in the record on appeal that the trial court took judicial notice of the judgment; a copy of the judgment was not included in the record on appeal; and there was thus no evidence of a canal constituting an encumbrance on the subject property.

APPEAL by plaintiffs from *Fountain, Judge*. Judgment entered 17 December 1979 in Superior Court, PAMLICO County. Heard in the

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Court of Appeals 16 October 1980.

On 5 June 1950, Elizabeth K. Alleman (now Wheeler) and husband David B. Alleman conveyed the property at issue in this action to plaintiff Paul R. Waters and James A. Tingle, Jr. The deed to Waters and Tingle included the following language immediately after the description:

Subject to the following covenants and restrictions which will run with and bind the land and will be considered as conditions subsequent with right of reentry on breach; that no timber shall be cut from any of these premises; that no irrigation indebtedness shall be imposed upon this land; that no building shall be removed from the premises without written permission of the parties of the first part hereto.

James A. Tingle, Jr. died on 29 June 1966 and his one-half undivided interest in the subject property was devised under his will to Wachovia Bank and Trust Company, N.A. (Wachovia) as trustee.

On 30 October 1974, plaintiffs Paul R. Waters, the surviving grantee under the Alleman deed, and Wachovia, trustee under the deed of James A. Tingle, Jr., entered into a contract with defendant, North Carolina Phosphate Corporation, under which N.C. Phosphate agreed to buy and the plaintiffs agreed to sell the subject property. The contract provided in pertinent part:

At the closing, SELLERS shall deliver to the BUYER a properly executed and recordable general warranty deed . . . conveying to BUYER an indefeasible fee simple and marketable title to the above described property. It is specifically understood and agreed that this property shall be conveyed subject to no encumbrances not satisfactory to BUYER, and that the same shall convey indefeasible fee simple and marketable title in and to any and all mineral rights within the perimeter of said property.

The closing date agreed upon by the parties was 17 January 1975.

At the time and place set for closing plaintiffs tendered a properly executed and recordable general warranty deed which purported to convey to N. C. Phosphate fee simple title to the subject property. N. C. Phosphate declined the tender of that deed on the grounds that plaintiffs could not convey an unencumbered marketable title to the

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property in accordance with the contract. Specifically, N. C. Phosphate expressed concern that the deed from the Allemans created a cloud on the title because it contained language purporting to create a condition subsequent with right of reentry and that the property was subject to an easement in favor of Carolina Power & Light Company (CP&L). CP&L had obtained a judgment in a condemnation action against the plaintiff in 1967 which gave it an easement permitting it to maintain a substantial electrical transmission line across the property, to clear all timber, structures and other things from the right-of-way, to go to and from the right-of-way across the subject property at all times and to do other things necessary for the maintenance of the transmission line.

This action was subsequently commenced on 30 April 1975. The first count of the complaint sought an order compelling N. C. Phosphate to purchase the subject property from the plaintiffs in accordance with the purchase contract, and the second count sought a declaratory judgment that the language in the Alleman deed which is quoted above was not sufficient to create a condition subsequent with right of reentry. The defendants in the action in addition to N. C. Phosphate were David B. Alleman and his new wife, Ruth G. Alleman, and Elizabeth Keys Alleman Wheeler (divorced).

The defendants Elizabeth K. Alleman Wheeler, David B. Alleman and wife, Ruth G. Alleman filed answers and counterclaims alleging that the deed to Tingle and Waters had in fact created a condition subsequent, that there had been a breach of the condition and that the defendants David B. Alleman and Elizabeth K. Alleman Wheeler were entitled to possession of the property. N. C. Phosphate's answer asserted that it had been entitled to refuse to purchase the subject property and that it was entitled to a return of the consideration already paid under the purchase contract because the plaintiffs had failed to tender a good unencumbered, indefeasible, fee simple and marketable title to the property.

On 9 April 1976, the trial judge granted summary judgment in favor of the plaintiffs against the defendants David B. Alleman and wife, Ruth G. Alleman and Elizabeth K. Alleman Wheeler. In an opinion filed on 2 February 1977, this Court affirmed the judgment of Judge Rouse. *Waters v. Phosphate Corp.*, 32 N.C. App. 305, 232 S.E. 2d 275, *disc. rev. denied*, 292 N.C. 470, 233 S.E. 2d 925 (1977).

The action subsequently came on for trial at the 17 December

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1979 Session of Superior Court in Pamlico County. The trial judge granted N.C. Phosphate's motion for a directed verdict at the close of the plaintiffs' evidence and plaintiffs appealed. Other pertinent facts are contained in the body of the opinion.

Gaylord, Singleton & McNally, by Louis W. Gaylord, Jr. and Danny D. McNally and Dixon & Horne by Phillip R. Dixon, for the plaintiffs-appellants.

Manning, Fulton & Skinner, by Howard E. Manning and Michael T. Medford and Sumrell, Sugg, Carmichael, Stubbs & Perdue, by Fred M. Carmichael, for the defendants-appellees.

MARTIN (Robert M.), Judge.

Plaintiffs assign as error the trial judge's granting of defendant's motion for a directed verdict at the close of plaintiffs' evidence. First, plaintiffs argue the trial court erred in granting a directed verdict for defendant because defendant's motion for directed verdict did not state the specific grounds therefor. We note, however, that plaintiffs failed to object at trial to the failure of defendant to state specific grounds for its motion. Plaintiffs, therefore, cannot raise such objection on this appeal. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970). Because defendant failed to state the grounds for its motion adequately, however, we must examine every possible basis for the motion in order to review the question of whether the evidence presented at trial, when considered in the light most favorable to plaintiffs, was sufficient to be submitted to the jury.

In its answer to the plaintiffs' complaint seeking specific performance of the contract of sale, N.C. Phosphate raised several grounds for avoiding the contract. First, N.C. Phosphate alleged that the language following the description in the Alleman-Waters deed was sufficient to create a valid condition subsequent with a right of reentry upon breach, thereby creating a cloud upon the title to the subject property and rendering plaintiffs' title unmarketable. Second, N. C. Phosphate alleged that the CP&L right-of-way and easement across the subject property constituted an encumbrance not satisfactory to it and rendered plaintiffs' title unmarketable. Third, N. C. Phosphate alleged that an 18 July 1960 judgment creating a canal corporation created a lien on the subject property which constituted an encumbrance unsatisfactory to it and rendered plaintiffs' title unmarketable. If true, any one of the above-mentioned grounds would justify the trial court in directing a verdict in N. C. Phosphate's favor.

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We will discuss each separately.

[1] Defendant argues the trial court was correct in granting its motion for directed verdict because plaintiff's title was unmarketable on the date of closing due to the presence of the reverter clause in the Alleman-Waters deed. It has now been judicially determined that the language in the Alleman-Waters deed was insufficient to create a condition subsequent with a right of reentry because it appeared in the description rather than in the granting or *habendum* clauses. *Waters v. Phosphate Corp.*, 32 N.C. App. 305, 232 S.E. 2d 275, *disc. rev. denied*, 292 N.C. 470, 233 S.E. 2d 925 (1977). In making that determination this Court relied on the Supreme Court's decision of *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976), which held that N.C. Gen. Stat. § 39-1.1 does not apply to conveyance executed prior to 1 January 1968 and that the *Artis/Oxendine* rule of construction should be applied to such deeds. See *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706 (1960); *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948). Although not finally made until over two years after the date set for closing, our decision in the previous appeal of this case precludes us from now holding that the plaintiffs' title was unmarketable as a matter of law on the date of closing due to the "reverter clause." Therefore this was not a proper ground for a directed verdict in defendant's favor in the case *sub judice*.

[2] With regard to the CP&L easement, we believe plaintiffs presented sufficient evidence to submit the issue of whether the CP&L easement constituted a visible easement to the jury. If the CP&L easement is found by the jury to be a visible easement, defendant would be deemed to have entered the contract to convey intending to take subject to the easement and defendant could not assert the CP&L easement as a reason to refuse to perform the contract.

General contracts to convey land, giving a title in fee, or free and clear of all encumbrances, or similar covenants, are generally held not to refer to visible physical burdens upon the land, permanent in character, known to the vendee. In the ordinary case the vendee is presumed to have contracted to accept the land subject to visible easements of an open and notorious nature. . . .

77 Am. Jur. 2d *Vendor and Purchaser*, § 222 at 399 (1975).

The character of the easement frequently determines whether the easement constitutes a defect in the vendor's

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title. Land, even in rural sections, is usually sold subject to some burdens, many of which not only are open and visible, but are beneficial rather than detrimental to the premises as a whole. The rule that a vendee is presumed to have contracted to accept land subject to visible easements of an open and notorious nature is applied by some courts to poles and wires used for telegraph, telephone, or power lines and a purchaser who enters into a contract for the purchase of the land burdened thereby, without objection on this ground, will be regarded as intending to take subject to this easement, and he cannot later object on this score.

Id., § 224 at p. 400.

North Carolina has recognized the doctrine of visible easements in cases involving breaches of the covenants of title in deeds. *Goodman v. Heilig*, 157 N.C. 6, 72 S.E. 866 (1911) (a railroad right-of-way); *Tise v. Whitaker-Harvey Co.*, 144 N.C. 508, 57 S.E. 210 (1907) (a public alley); *Ex Parte Alexander*, 122 N.C. 727, 30 S.E. 336 (1898) (a railroad right-of-way). "[A] public road and a right-of-way of a railroad in operation are not considered encumbrances, it being presumed that a purchase of land through which a road or railway right-of-way runs was made with reference to the road or right-of-way and that the consideration was adjusted accordingly." J. Webster, *Real Estate Law in North Carolina* § 190 at 224 (1971).

We feel that the rationale of the rule that visible easements do not constitute encumbrances in breach of the covenants of title in a deed is equally applicable to contracts to convey subject to no encumbrances or subject to no encumbrances not satisfactory to the purchaser. Other jurisdictions agree with us. *See* 77 Am. Jur. 2d, *supra*, § 222. The question of whether the CP&L easement in the case *sub judice* was of a visible, open and notorious nature was a question of fact for the jury to decide based on the evidence presented at trial. It was error, therefore, for the trial court to grant defendant's motion for a directed verdict on this ground.

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judgment creating a canal corporation pursuant to N.C. Gen. Stat. § 156-43 was not entered into evidence at trial; there is no indication in the record on appeal that the trial court took judicial notice of the judgment; and a copy of the judgment is not included in the record on appeal. Therefore, there is no evidence whatsoever that other land-owners had any rights in a canal located on the subject property or that any canal existed on the subject property. Thus there is no evidence of an encumbrance on the subject property in this regard.

For the reasons stated above, we feel that the trial court erred in granting defendant's motion for a directed verdict in its favor. It is unnecessary to discuss plaintiff's other assignments of error regarding certain evidentiary rulings by the trial court as they may not recur at a subsequent trial in this case. The judgment appealed from is

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

IN THE MATTER OF MICHAEL WAYNE HUGHES, JUVENILE

No. 8025DC590

(Filed 6 January 1981)

1. Infants § 20— violation of probation for delinquency — commitment to Division of Youth Services

Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing \$60 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent.

2. Infants § 20— commitment of juvenile for delinquency — threat to persons or property in community

The district court sufficiently found that respondent juvenile's behavior constituted a threat to persons or property in the community to support commitment of respondent to the Division of Youth Services where the court found that respondent "was adjudicated delinquent for injury to real property with an air rifle" and that

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"adjudication was made that [respondent] had stolen \$60 from a purse," and the court found from these facts that respondent's "behavior constitutes some threat to persons or property in the community."

APPEAL by juvenile from *Tate, Judge*. Juvenile Commitment Order entered 20 March 1980 in District Court, CATAWBA County. Heard in the Court of Appeals 4 November 1980.

The juvenile respondent appeals from a 20 March 1980 Order committing him for an indefinite term to the custody of the Division of Youth Services for placement in one of its residential facilities. The following preceded entry of the 20 March 1980 Order:

- (1) A Juvenile Petition filed 8 February 1978 alleged that respondent was unlawfully absent from school on at least five occasions. By Orders dated 21 February 1978 the juvenile court found that respondent was an undisciplined child as defined by G.S. 7A-278 (5) (now repealed) due to unlawful absence from school, and placed respondent on probation for two years.
- (2) A Juvenile Petition filed 12 May 1978 alleged that respondent was a delinquent child as defined by G.S. 7A-278 (2) (now repealed) for having committed an assault with a deadly weapon. By Order filed 6 June 1978 the juvenile court dismissed the petition for failure to find the truth of the allegations beyond a reasonable doubt, but found that respondent previously had been adjudicated an undisciplined child and was "very much in need of more adequate supervision and a more structured environment." It therefore ordered that custody of respondent be placed in the Catawba County Department of Social Services (hereinafter DSS), with authorization to "make placement in his mother's home, in its discretion, pending more adequate placement."
- (3) A Juvenile Petition dated 21 August 1978 alleged that respondent was a delinquent child for having wilfully injured a home by shooting out windows and screens "with a BB Air Rifle." By Orders dated 22 August 1978 the juvenile court found respondent to be delinquent, and ordered "that probation be continued, and that DSS intensify its efforts." The court also provided that the complainant homeowner could file a motion for review after she obtained a damage estimate.

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- (4) A Petition in Pending Case or Motion for Review filed 14 September 1979 set forth the sum of \$667.24 as complainant's total damages and requested further disposition with regard to restitution. By Order entered 26 September 1978 the juvenile court found that restitution of this sum by a twelve-year-old boy was out of the question; continued respondent's probation; and continued custody in DSS until further order.
- (5) A Juvenile Petition filed 24 September 1979 alleged that respondent was delinquent for having stolen the sum of \$60.00 from a complainant's purse. By Order dated 23 October 1979 the juvenile court found respondent to be delinquent and continued final disposition for three months. By Order dated 18 December 1979 the court ordered respondent placed on probation for a period of one additional year upon certain terms and conditions, including the following: "That he cooperate with DSS in accepting placement at Sipe's Orchard Home, and cooperate with agents of that institution."
- (6) A Petition in Pending Case or Motion for Review filed 11 March 1980 alleged that respondent was an undisciplined child in that he had violated the conditions of his probation by not accepting placement at Sipes Orchard Home and not cooperating with the agents of DSS. A further Order of the court entered 11 March 1980 committed respondent to the Division of Youth Services for an indefinite term not to exceed his eighteenth birthday for placement in one of its residential facilities. Commitment was suspended for two years with respondent's consent upon the terms and conditions of the 18 December 1979 Order and the added conditions that he accept immediate placement in Sipes Orchard Home and accept counseling and treatment through the local Mental Health Center.
- (8) A hearing was held before the juvenile court, on a date not set forth in the record on appeal, at which respondent's case worker with DSS testified that subsequent to the 11 March 1980 Order respondent had not gone to Sipes Orchard Home; had run from school several times; and had said he was not going to stay at Sipes Orchard Home. The case worker recommended that respondent be placed in training school. By Order entered 20 March 1980 the juvenile court found as a fact

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that respondent did not accept placement at Sipes Orchard Home or cooperate with officials of the Home; that respondent had been adjudicated undisciplined for truancy and placed on juvenile probation; that respondent had been adjudicated delinquent for injury to real property with an air rifle, and continued on probation; that respondent had been adjudicated delinquent for having stolen \$60.00 from a purse, and was continued on probation with the added condition that he cooperate with DSS in accepting placement at Sipes Orchard Home; that on 11 March 1980 an adjudication was made that respondent had not accepted this placement, and disposition was a suspended commitment to the Division of Youth Services, reiterating the prior conditions; and that the court now had found again that respondent had not accepted and continued not to accept residential placement and no other suitable placement in the community appeared to be available. The court thereupon ordered the commitment to custody of the Division of Youth Services for placement in one of its residential facilities, from which order respondent appeals.

Attorney General Edmisten by Associate Attorney Robert L. Hillman, for the State.

Randy D. Duncan for respondent appellant.

WHICHARD, Judge.

[1] By the first assignment of error argued in respondent's brief, he contends the court erred in committing him to the Division of Youth Services in that he was an "undisciplined" juvenile for whom such commitment was not a statutorily provided dispositional alternative. The initial Juvenile Petition against respondent did charge him with the "undisciplined" behavior of unlawful absence from school. It was for this "status offense" (an offense committed by a juvenile which would not be a crime if committed by an adult) that respondent was initially placed on probation. If commitment to the Division of Youth Services had been grounded on the commission of this offense alone, we would have been compelled to reverse the juvenile court on the grounds that such commitment is not a statutorily permissible dispositional alternative for "undisciplined" behavior. G.S. 7A-648 (Supp. 1979).

Respondent was subsequently, however, adjudicated delinquent

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for two unrelated offenses: first, damage to property from shooting out the windows and screens of a home with an air rifle; and second, stealing the sum of \$60.00 from a purse. The juvenile court, in compliance with the stated purpose of the North Carolina Juvenile Code of avoiding commitment of the juvenile to training school if he could be helped through community-level resources, G.S. 7A-646 (Supp. 1979), continued respondent's probation in the disposition of both offenses. In so doing the court imposed conditions of probation with which respondent repeatedly refused to comply.

G.S. 7A-658, in pertinent part, provides:

If a juvenile violates the conditions of his probation, he and his parent after notice, may be required to appear before the court *and the judge may make any disposition of the matter authorized by this act.*

G.S. 7A-658 (Supp. 1979) (emphasis supplied). Commitment of a "delinquent" juvenile to the Division of Youth Services for placement in one of its residential facilities is a disposition authorized by the act. G.S. 7A-649 (10), -652 (Supp. 1979). Therefore, upon finding respondent in violation of the conditions of his probation subsequent to his having been adjudicated delinquent, the juvenile court had the authority to make the commitment which it ordered.

Once respondent was adjudicated delinquent, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded. His commitment to the Division of Youth Services for violation of the conditions of his probation resulting from delinquent behavior was within the ambit of the statutorily permissible dispositional alternatives, rendering this assignment of error without merit.

[2] By the second assignment of error argued in respondent's brief, he contends the court erred by not making findings of fact sufficient to authorize commitment to the Division of Youth Services in that it failed to find that his behavior constituted a threat to persons or property in the community. G.S. 7A-652 requires, as a condition to commitment of a delinquent juvenile to the Division of Youth Services, that the juvenile court find: (1) that the "alternatives to commitment . . . in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate," and (2) "that the juvenile's behavior constitutes a threat to persons or property in the community." G.S. 7A-652 (a). The

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court here satisfied the first requirement by finding that respondent had not accepted and continued not to accept residential placement in community-level facilities, and that no other suitable placement in the community appeared to be available. It satisfied the second requirement by finding that respondent “was adjudicated delinquent for injury to real property with an air rifle” and that “adjudication was made that [respondent] had stolen \$60.00 from a purse”; and by finding from these facts that respondent’s “behavior constitutes some threat to persons or property in the community.” These findings render this assignment of error without merit.

It is evident that the juvenile court, to no avail, made every effort to comply with the purpose of the North Carolina Juvenile Code by selecting “the least restrictive disposition . . . that is appropriate to the seriousness of the offense” and by attempting to avoid commitment of the juvenile to training school “if he can be helped through community-level resources.” G.S. 7A-646. Only after numerous unsuccessful efforts to deal with the juvenile by other less restrictive dispositional alternatives did the court resort to the most restrictive alternative, namely, commitment to training school. We find no error in the proceedings of the juvenile court or in its ultimate disposition, and the Order appealed from is therefore

Affirmed.,

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT JONES

No. 8012SC648

(Filed 6 January 1981)

1. Criminal Law § 92.3— similar offenses not joined — waiver of right to joinder

Defendant waived any right of joinder of offenses involving possession and sale of contraband where defendant failed to move for joinder, and there was no merit to defendant’s argument that, since the State made a motion for joinder, it was not necessary for defendant to make the identical motion, since it was defendant’s duty to let the court know that he was relying on the State’s motion, and defendant failed to do so.

2. Narcotics § 3.1— events prior to crime charged — admissibility of evidence

In a prosecution of defendant for possession and sale of heroin, the trial court

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did not err in admitting evidence that an officer went to defendant's apartment four days before the date of the crimes charged and paid defendant for a tinfoil package of white powder, since such evidence was relevant as a pregnant circumstance tending to show the relationship between defendant and the officer and a pattern of criminal activity.

3. Criminal Law § 101.2—jurors' reading of newspaper article — defendant not prejudiced

In a prosecution for possession and sale of heroin where three jurors read a newspaper article which included information of defendant's prior conviction on a charge of selling heroin which was not admissible at trial, defendant was not entitled to a mistrial, since evidence of another prior transaction in which an officer paid defendant \$350 for a white powder was properly admitted; the trial judge examined the jurors who had read the newspaper article and justifiably concluded that they had not formed an opinion as a result of reading the article and that they could make a decision based solely on the evidence presented at trial; and defendant did not request the right to examine the jurors.

APPEAL by defendant from *Lee, Judge*. Judgment entered 6 March 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 November 1980.

Defendant was convicted of (1) possession of heroin with intent to sell and deliver on 25 September 1978 and (2) on the same date, sale of heroin to O. A. Rousseau, a federal officer. He appeals from the judgment imposing two prison terms of 8 to 10 years to run concurrently upon the completion of terms he is currently serving.

The defendant was originally charged in two separate indictments with possession with intent to sell and deliver heroin and the sale and delivery of heroin. These offenses were alleged to have occurred on 29 August 1978 and 1 September 1978, respectively. Trials on these charges were held 30 January 1979 and 6 March 1979. Both resulted in mistrials.

On 26 March 1979, the defendant was again indicted on charges of possession with intent to sell and deliver heroin, and the sale and delivery of heroin in cases numbered 79CRS13162, 79CRS13161 and 79CRS13164, the present charge. Subsequently, the State dismissed the charges against the defendant in those cases that had resulted in mistrials, and proceeded to trial in cases numbered 79CRS13162 and 79CRS13163 on 23 October 1979. From the verdict of guilty, the defendant appealed his conviction in said two cases, and on such appeal (*State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6, filed 15 July 1980), this Court found no error.

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At defendant's trial in cases numbered 79CRS13162 and 79CRS13163, the defendant moved the Court to have the charges dismissed against him on the basis that said charges constituted joinable offenses with those charges dismissed by the State following the two mistrials. Defendant's motion was denied at trial, and on appeal, the decision of the trial court was affirmed. *Id.*

Then, while the defendant's conviction was pending appeal in cases numbered 79CRS13162 and 79CRS13163, the State prosecuted the defendant in case numbered 79CRS13164, the present case before this Court.

Prior to the call of the present case for trial, the defendant moved the Court on 14 November 1979, for an Order dismissing the charges against him on the ground that said charges constituted a joinable offense under North Carolina General Statute 15A-926, and should have been tried with the cases against this defendant in 79CRS13162 and 79CRS13163. This motion was denied.

The State's evidence tended to show that Alexander Rousseau, Special Agent for the U. S. Drug Enforcement Administration, on 25 September 1978 purchased heroin in a tinfoil package from the defendant at his apartment for \$350.00. Rousseau had first met defendant at the apartment on 21 September 1978 when he bought heroin from defendant.

Defendant offered no evidence.

Attorney General Edmisten by Special Deputy Attorney General Charles J. Murray for the State.

Pope, Reid, Lewis & Deese by Renny W. Deese for the defendant appellant

CLARK, Judge.

[1] Defendant assigns as error the denial of his motion to dismiss on the ground that this charge (79CRS13164) relating to acts transpiring on 25 September 1978 was not joined for trial with the charges relating to acts transpiring on 21 September 1978 (79CRS13162 and 79CRS 13163), and resulting in charges of possession with intent to sell heroin, sale of heroin, and conspiracy to sell heroin.

The trial court, after hearing on the motion, found that the three indictments were returned by the grand jury on 26 March 1979; that

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on 5 October 1979 the State filed a motion for joinder of the three indictments; that defendant did not oppose the motion for joinder but neither the State nor the defendant requested a hearing on the motion; that on 23 October 1979 the State called for trial cases 79CRS13162 and 79CRS13163, relating to acts of 21 September 1978, and defendant at that time, did not object to the joinder of the two indictments for trial or to the failure to call for trial case 79CRS13164, relating to acts of 25 September 1979. The court concluded that defendant had waived any right of joinder.

We agree with the conclusion of the trial court that defendant waived any right to joinder. G.S. 15A-926(c)(1) provides that defendant's failure to make the motion to join two or more joinable offenses "constitutes a waiver of any right of joinder" G.S. 15A-926(c)(2) provides in part that a motion to dismiss for failure to join joinable offenses made after trial for one offense must be granted unless "b. The court finds that the right of joinder has been waived"

Defendant makes the argument that since the State made the motion for joinder it was not necessary for defendant to make the identical motion. The weakness in this argument is that the State and the defendant may have different reasons for joinder or severance. In some cases the joinder of multiple charges may be prejudicial to a defendant, far outweighing the loss of time and money which would result from multiple trials. If defendant wanted to ride piggyback on the State's motion, it was his duty to make his position known to the court. In failing to do so when the two charges relating to acts on 21 September 1978 were called for trial, the defendant waived any right to joinder of the charge which is the subject of this appeal.

It is noted that G.S. 15A-926(c)(2) applies after a trial on another charge and the motion to dismiss is permitted unless the motion for joinder was previously decided against the defendant or unless the defendant has waived his right to object by his earlier failure to request joinder of related offenses. G.S. 15A-926(c) was designed to provide a means by which a defendant may protect himself from multiple trials on charges of related offenses when the charges later brought up for trial were not known to the defendant at the time of the first trial. If the severed charges were pending at the time of the first trial, the defendant waives any right to joinder by failing to move for joinder. We find that defendant in the case *sub judice* waived any right to joinder.

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[2] Defendant assigns as error the admission of the evidence that Officer Rousseau on 21 September 1978 (four days before the date of the crime charged in the case before us) went to defendant's apartment and paid him for a tinfoil package of white powder. Defendant makes the argument that since the State offered no evidence that the white powder was heroin, there is "nothing more than an intimation of a crime, and is prejudicial." It may be argued with some merit that any evidence offered by the State not prejudicial to the defendant is irrelevant. The question is admissibility, and the test of admissibility is relevancy. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918 (1978). If Officer Rousseau, the chief State's witness, had been limited in his testimony to relating only the events of 25 September 1978, he would have started his testimony by relating the making of four unsuccessful telephone calls in attempting to contact defendant at his apartment, and the jury would not have the benefit of any evidence relative to the witness's prior association with defendant and the purpose in attempting telephone contact. We find the evidence relevant as a pregnant circumstance tending to show their relationship and pattern of criminal activity. This assignment of error is overruled.

[3] The defendant assigns as error the denial of his motion for mistrial based on the reading by three jurors of a newspaper article appearing on the morning of 6 March 1980 in *The Fayetteville Times*. The article accurately reported that the trial of defendant on the charge of selling heroin was in progress and added: "He is appealing a November conviction of similar heroin charges. He received a 10-year prison sentence following that conviction."

It further appears from the record that the State made an oral pretrial motion that evidence of the transaction between the State's witness, Agent Rousseau, and the defendant on 21 September 1978 be admitted for the purpose of showing identity and common scheme or plan. The court ruled that the evidence would be admitted for that limited purpose, and then (in the absence of the jury) stated to the prosecuting attorney and defense counsel:

"The Court would caution the State not to bring out in the State's case in chief evidence of any conviction of this defendant involved in [or] arising out of the September 21st incident."

A motion for mistrial based on alleged misconduct affecting the

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jury is addressed to the discretion of the trial judge. Strong's N.C. Index 3d *Criminal Law* § 101 (1976). "The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown." *State v. Moye*, 12 N.C. App. 178, 188, 182 S.E. 2d 814, 820 (1971).

The exposure of jurors to news media reports during trial has been a very real problem for a long time. See *State v. Moye*, *supra*, and *State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), for lengthy discussions of the problem; Strong's N.C. Index 3d *Criminal Law* § 101.2 (1976) for compilation of state cases; and Annot., 31 A.L.R. 2d 417 (1953), for cases from other jurisdictions. The ever-widening coverage by the press, radio, and television is likely to bring the problem before the courts with increasing frequency. The problem is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has been violated when information or evidence reaches the jury which would not be admissible at trial.

In the case *sub judice* the circumstance that the newspaper article included the information of defendant's prior conviction on the charge of selling heroin which was not admissible at trial may be sufficient, nothing else appearing, to warrant a mistrial. See *Marshall v. United States*, 360 U.S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959). But there were other circumstances which were present and presumably considered by the trial judge. Evidence of the prior transaction in which Special Agent Rousseau paid defendant \$350.00 for a white powder was properly admitted. The trial judge examined the jurors who had read the newspaper article, and he had the opportunity to observe them during examination and to consider their demeanor and their answers to his questions. We note that defendant did not request the right to examine the jurors. The trial judge was justified in concluding that they had not formed an opinion as a result of reading the article and that they could make a decision based solely on the evidence presented at trial. We find no error in the decision of the trial judge to deny defendant's motion for mistrial.

We have carefully considered defendant's other assignments of error and do not find them meritorious.

No error.

Power & Light Co. v. Merritt

Judges HEDRICK and WHICHARD concur.

CAROLINA POWER & LIGHT COMPANY v. JOHN W. MERRITT AND WIFE, EDITH R. MERRITT; WILLIAM D. MERRITT, JR.; JOHN W. MERRITT AND WILLIAM D. MERRITT, JR., EXECUTORS OF THE ESTATE OF WILLIAM D. MERRITT, SR., DECEASED

No. 809SC486

(Filed 6 January 1981)

1. Eminent Domain § 6.9— cross-examination of value witness

In an eminent domain proceeding in which a witness for respondents had offered his opinion that the highest and best use of the property was as a water impoundment area as contemplated by petitioner power company and that, in arriving at his estimation of the value of the land after the taking, he assumed that the landowners' remaining land would have no access to the water, respondent landowners were not prejudiced when petitioner cross-examined the witness as to the effect which access to the water would have on the value of the respondents' remaining property.

2. Eminent Domain § 5.4— instructions — intended use of property

Trial court in an eminent domain proceeding properly instructed that the jury should not consider any evidence of value based upon petitioner power company's intended use of the property, although some of respondent landowners' witnesses had testified that the highest and best use of the property was the same as that planned by petitioner.

3. Eminent Domain § 5.4— instruction on just compensation rule

The trial court's instruction in an eminent domain case that "the just compensation merely requires that the [landowners] should be paid for what is taken from them" could not have misled the jury into believing that it should not consider damages to the landowner's remaining land in determining the amount of compensation.

4. Eminent Domain § 6.5— non-expert value testimony — instructions

The trial court in an eminent domain proceeding did not err in failing to instruct the jury on the propriety of non-expert testimony as to value.

APPEAL by respondents from *Brannon, Judge*. Judgment entered 28 November 1979 in Superior Court, PERSON County. Heard in the Court of Appeals 12 November 1980.

Petitioner, Carolina Power & Light Company, (hereinafter CP&L) initiated this action in eminent domain under Chapter 40 of

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the General Statutes of North Carolina. CP&L sought to acquire real property owned by respondents, the Merritts, for the purpose of constructing, maintaining, and operating a steam electric generating plant to supply electricity to the public.

Commissioners were named by order of the clerk of the superior court to appraise the property and determine the amount of compensation and damages due the Merritts by virtue of the taking. The commissioners assessed damages in the sum of \$1,105,166, and CP&L excepted. Judge Hobgood confirmed the Report of the Commissioners. CP&L appealed and demanded a trial by jury on the issue of just compensation.

At trial, evidence for the Merritts tended to show that the highest and best use of the property was for industry or for a water impoundment or reservoir. The difference between the fair market value of the land before and after the taking ranged from \$1,047,700 to \$2,300,000.

Witnesses for CP&L testified that the highest and best use of the property was for agriculture and growing timber. They estimated the difference between a fair market value before and after the taking ranged from \$238,388 to \$273,400.

The issue presented to the jury was:

What amount, as just compensation, are the defendants Merritt (landowners) entitled to recover of petitioner, Carolina Power & Light Company, for the taking of 558.273 acres of their property and for damages, if any, to the defendants' remaining 241.115 acres?

The jury answered that the Merritts were entitled to \$335,200. Judgment was entered in that amount plus interest and the Merritts appeal.

Andrew McDaniel, Associate General Counsel, Carolina Power & Light Company, and Ramsey, Hubbard & Galloway, for petitioner appellee.

Jackson & Hicks, by Alan S. Hicks, for respondent appellants.

MARTIN (Harry C.), Judge.

[1] Respondents first contend that the court erred in allowing their witness Satterfield to be questioned in an argumentative and specula-

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tive manner during cross-examination, based on the following colloquy:

MR. McDANIEL: Mr. Satterfield, let me clarify this and make sure - asking you to make an assumption - just assume there will be access at some point to this reservoir to be constructed, do you think it would have any effect on the adjoining property to the reservoir as far as market value.

MR. BRYANT: Objection, your Honor.

COURT: Overruled. If he knows and has an opinion.

MR. SATTERFIELD: Are you saying access at some point? Would you clarify that?

MR. McDANIEL: Well, say you can get on the lake in a boat around the various points around the lake.

MR. SATTERFIELD: Assuming you could do that five miles from Mr. Merritt's property, I don't see where it would make his property worth any more.

MR. McDANIEL: What if you could do it a mile from his property?

MR. BRYANT: Objection, your Honor.

COURT: Try not to ask questions of a speculative nature, but the objection is overruled with that speculation.

MR. SATTERFIELD: In my opinion, unless he had access from his property, I don't know that having access a mile away would necessarily increase the value of his property.

TO THE OVERRULING OF OBJECTIONS TO THE
ABOVE SET OUT QUESTIONS, THE APPEL-
LANTS OBJECT AND HEREBY ASSIGN SAME AS
THEIR EXCEPTION NO. 4.

I recognize that the owners - the Merritt brothers - are part of the general public.

MR. McDANIEL: But would it be fair to say that if there is an access ramp on or near this property that it would make a difference, in your opinion, as to value?

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MR. BRYANT: Objection.

COURT: Overruled.

MR. SATTERFIELD: If they had access from their property to the lake, I would say it would increase the value of their property, in my opinion.

We are unable to interpret these questions as argumentative. *Cf. State v. Mason*, 295 N.C. 584, 248 S.E.2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979) (question clearly argumentative where witness had twice responded “no” to same question); *In re Will of Kemp*, 236 N.C. 680, 73 S.E.2d 906 (1953) (argumentative questions concerning mental capacity of decedent).

It is true, as respondents point out, that speculative questions, those which assume facts not in evidence, are improper. *Rush (Cross) v. Beckwith*, 293 N.C. 224, 238 S.E.2d 130 (1977); *State v. Clontz*, 6 N.C. App. 587, 170 S.E.2d 624 (1969). In the present case, however, during direct examination witness Satterfield had offered his opinion that the highest and best use of the property “was as water impoundment area, such as a reservoir.” In arriving at his estimation of the value of the land after the taking, he assumed that the Merritts’ remaining land would have no access to water, and therefore assigned a lower value. After respondents themselves had offered this opinion, which the witness himself later categorized as “theoretical and potential,” we fail to see how it could be prejudicial for petitioner to continue questioning the witness along the same line. The burden is on respondents to show prejudice from the admission of the testimony. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970). No dollar value was assigned to the possible effect of access to water. Additionally, during the charge to the jury, Judge Brannon instructed them to reject “purely imaginative or speculative uses and values.” Unlike the situation in *Light Company v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964), in which it was held that a similar instruction was insufficient to remove the prejudicial effect of a large amount of inadmissible and conjectural evidence, we hold that the court’s admonition was adequate.

[2] Respondents next assign error to the court’s instruction that the jury should not consider any evidence of value based upon petitioner’s intended use of the property. Respondents concede that this is a correct statement of the law. *Light Co. v. Moss*, 220 N.C. 200, 17 S.E.2d 10 (1941). They argue, however, that because some of respondents’

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witnesses testified that the highest and best use of the property was the same as that planned by petitioner, the effect of the instruction was to withdraw respondents' evidence from the jury's consideration.

In *State v. Johnson*, 282 N.C. 1, 24, 191 S.E.2d 641, 657 (1972), the Court explained the rule for determining the value of property before a taking:

In condemnation proceedings the determinative question is: In its condition on the day of the taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom, and adequate means? "The owner's actual plans or hopes for the future are completely irrelevant." Such aspirations being "regarded as too remote and speculative to merit consideration." 4 Nichols § 12.314 (1971).

Here, the court properly charged the jury on the factors to consider in determining the value. Additionally, respondents failed to offer an instruction on the issue or to object during trial, thus waiving their right to now complain. *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794 (1971); *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962). The assignment of error is overruled.

[3] Similarly, we find no merit in respondents' contention that the court erred in instructing the jury that "[t]he just compensation rule merely requires that the Merritts should be paid for what is taken from them." This statement was made during Judge Brannon's discussion of the fair market value before the taking. Again, respondents concede that the court stated the correct principle for determining the amount of compensation, both before and after the excepted-to portion of the charge. Nor did respondents object to the instruction when it was given. The charge to the jury must be interpreted in context. Isolated portions will not constitute prejudicial error. *Nance v. Long*, 250 N.C. 96, 107 S.E.2d 926 (1959); *Coletrane v. Lamb*, 42 N.C. App. 654, 257 S.E.2d 445 (1979). There is no indication that the jury was misled by this instruction into believing they should not consider damages to the remaining land. The assignment of error is overruled.

[4] Respondents further protest the court's failure to instruct the jury on the propriety of non-expert testimony as to value. Any witness familiar with the property may testify as to his opinion of its value. *See*

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Highway Commission v. Privett, 246 N.C. 501, 99 S.E.2d 61 (1957); *Light Co. v. Rogers*, 207 N.C. 751, 178 S.E. 575 (1935). Respondents' evidence was properly admitted without objection. The credibility of all the witnesses was for the jury to determine and the court so instructed, adding that the same guidelines apply to the testimony of expert witnesses, with consideration of their training, experience, knowledge, and ability if the jury so found. Respondents argue that an instruction such as they now propound should have been given without its tender because the issue was a "substantial feature" of the case. We find this argument frivolous, and reject the exception. We note that the jury returned a verdict for an amount greater than the damages estimated by petitioner's witnesses, although less than that estimated by respondents' witnesses. It is apparent that the jury evaluated the evidence submitted by both parties in arriving at their conclusion.

Last, respondents contend that the court erred in failing to instruct the jury further on the issue of just compensation. When the jury foreman questioned whether sentimental value should be considered in determining damages, Judge Brannon properly advised him it should not. *See In re Land of Alley*, 252 N.C. 765, 114 S.E.2d 635 (1960). The foreman's additional remarks indicated that the jury knew how to calculate fair market value and was not confused. Judge Brannon's instructions were entirely adequate under the circumstances. We find

No error.

Chief Judge MORRIS and Judge WEBB concur.

D. R. JOHNSTON v. JAMES R. GILLEY AND SMITH W. BAGLEY

No. 8026SC531

(Filed 6 January 1981)

1. Constitutional Law § 24.6; Process § 9— long arm statute — personal jurisdiction over defendant

In an action to recover against defendants as guarantors of plaintiff's employment contract, G.S. 1-75,4(5) authorized *in personam* jurisdiction over one defendant where the facts tended to show that in April 1973 defendant was a resident of Forsyth County and a principal shareholder, officer, and director of the Washington Group, Inc., an N.C. corporation; in April 1973 Washington Mills-Retail, Inc., an N.C.

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corporation and a subsidiary of the Washington Group, acquired all or substantially all of the capital stock of Johnston Mills Company, and in the process, entered into an employment agreement with plaintiff; the agreement in pertinent part provided for the employment of plaintiff for a period of 18 years and required him to provide specified services, some of which were to maintain liaison between Johnston Mills and banks in the metropolitan Charlotte, N. C. area; it also required him to maintain an office in the metropolitan Charlotte area; these provisions specifically included services to be performed in N. C., and were themselves sufficient to bring the case within the provisions of the long arm statute; in addition, the contract called on plaintiff to perform a variety of other services, which included serving as an officer or director of Johnston Mills, Washington Retail, and the Washington Group, all N.C. corporations, and assisting Johnston Mills in its relations with city, county, and state governments; and these contractual provisions clearly implied services to be performed to some extent in N. C.

2. Process § 9.1 — nonresident defendant — minimum contacts — personal jurisdiction over defendant

In an action to recover against defendants as guarantors of plaintiff's employment contract, one defendant had sufficient minimum contacts with N.C. to justify the trial court's exercise of *in personam* jurisdiction where the evidence tended to show that, at the time the contract was entered into, defendant resided in this State; he participated in the management of N. C. corporations which acquired the stock of another N. C. corporation which allegedly was supposed to hire plaintiff; it was thus clear that defendant's contacts with the employer and plaintiff, the employee, were neither casual nor fortuitous; as a guarantor of the promises made by the employer and another N. C. corporation, defendant manifested a direct and substantial interest in the transactions, purposely availed himself of the privilege of conducting activities within N. C., and invoked in one aspect or another the benefit and protection of the laws of N. C.; and these were mutual promises and obligations entered into by people residing in the State and corporations chartered by the State. Moreover, there was no merit to defendant's argument that, because he moved out of the State in 1975 and has not resided in the State since then, the constitutionally required minimum contacts no longer exist and jurisdiction is thereby defeated, since the minimum contacts standard can be reasonably applied only to the circumstances and events giving rise to the promises referred to in G.S. 1-75.4(5), and not to the circumstances giving rise to a breach; nor was there merit to defendant's argument that because he was a guarantor of employer's contract, his obligation to plaintiff, if any, was to pay the debt of another and not to pay for plaintiff's services and he was therefore not a defendant who had promised to pay for services as that term is used in G.S. 1-75.4(5), since a guarantee of payment is an absolute promise, a direct and original undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of default of another person who is liable for such payment or performance in the first place.

APPEAL by defendant from *Ferrell, Judge*. Order entered 13 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 December 1980.

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This action was brought by plaintiff against defendants as guarantors of an employment contract between plaintiff and Johnston Mills Company (Johnston Mills). In his complaint, plaintiff alleged that defendant Gilley is a resident of Forsyth County, North Carolina and that defendant Bagley is a resident of Forsyth County, or Washington, D.C., or both places. Plaintiff further alleged the execution of the contract by Johnston Mills, the execution of the guarantee of the contract by the defendants, and default by Johnston Mills. He prayed for judgment against the defendants, jointly and severally. Service of process was obtained by registered mail, pursuant to the provisions of G.S. 1A-1, Rule 4(j)(9)b of the Rules of Civil Procedure.

Defendant Bagley moved to dismiss for lack of jurisdiction over the person of defendant Bagley and for insufficiency of service of process. Following a hearing, Judge Ferrell entered an order denying Bagley's motion, from which order Bagley has appealed.

Caudle, Underwood & Kinsey, P.A., by Lloyd C. Caudle and John H. Northey III, for the plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and Reid L. Phillips, for the defendant appellant.

WELLS, Judge.

Defendant Bagley argues that the trial court erred (1) in concluding that G.S. 1-75.4(5)¹ authorized the trial court to exercise *in personam* jurisdiction over him; and (2) that the trial court erred in concluding

¹ G.S. 1-75.4(5), commonly referred to as the "long arm" statute, provides in pertinent part as follows:

- (5) Local Services, Goods or Contracts.--In any action which:
- a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
 - b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
 - c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value

....

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ing that the court's exercise of *in personam* jurisdiction over him did not violate due process of law. Defendant's argument follows the two-step analysis suggested by our Supreme Court in *Dillon v. Funding Corp.*, 291 N.C. 674, 675-76, 231 S.E. 2d 629, 630-31 (1977) and followed in *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 513, 251 S.E. 2d 610, 613 (1979).

[1] The "long arm" statute has been the subject of a number of recent decisions of our appellate court and the federal courts. These cases have consistently held that the provisions of the statute are to be liberally construed in favor of finding personal jurisdiction, consistent with due process limitations under the Fourteenth Amendment to the United States Constitution.

The facts, shown by admissions or affidavits before the trial court, tend to show the following circumstance and events. In April 1973, Bagley was a resident of Forsyth County, and a principal shareholder, officer and director of The Washington Group, Inc., a North Carolina corporation. In April 1973, Washington Mills-Retail, Inc., a North Carolina corporation and a subsidiary of the Washington Group, acquired all or substantially all of the capital stock of Johnston Mills Company, and in the process, entered into the agreement with Johnston. The agreement in pertinent part provided for the employment of Johnston for a period of eighteen years and required Johnston to provide specified services, some of which were to maintain a liaison between Johnston Mills and banks in the metropolitan Charlotte, North Carolina area. It also required him to maintain an office in the metropolitan Charlotte area. We hold that these provisions specifically include services to be performed in North Carolina, and are in themselves sufficient to bring this case within the provisions of the long-arm statute. In addition, the contract called on plaintiff to perform a variety of other services, which included serving as an officer or director of Johnston Mills, Washington-Retail, and The Washington Group, all North Carolina corporations, and assisting Johnston Mills in its relationships with city, county, and state governments. These contractual provisions clearly imply services to be performed to some extent in North Carolina. On these facts defendant simply cannot prevail on his argument that the statute does not authorize *in personam* jurisdiction over defendant Bagley.

[2] We now turn to the minimum contacts aspect of this case. In *Buying Group, supra*, our Supreme Court stated the minimum con-

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tacts standard as follows:

The constitutional standard to be applied in determining whether a State may assert personal jurisdiction over a nonresident defendant is found in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945): “[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment *in personam*, . . . he have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” We noted in *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974), that the “minimum contacts” standard delineated in *International Shoe* did not mean that all due process restrictions on the personal jurisdiction of state courts had been removed. In *Chadbourn*, quoting from *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958), we stressed that while application of the minimum contacts standard “will vary ‘with the quality and nature of defendant’s activity, . . . it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.’” Absent such purposeful activity by defendant in the forum State, there can be no contact with the forum State sufficient to justify personal jurisdiction over defendant. *Accord, Hanson v. Denckla, supra; Chadbourn, Inc. v. Katz, supra.*

Buying Group, supra, at 515, 251 S.E. 2d at 614.

Applying that standard to this case, in light of Bagley’s residence in the state and his participation in the management of those North Carolina corporations which acquired Johnston Mills’ stock, another North Carolina corporation, it is clear that Bagley’s contacts with Johnston Mills, the employer, and Johnston, the employee, were neither casual nor fortuitous.² As a guarantor of the promises made by Johnston Mills and Washington-Retail, Bagley manifested a direct and substantial interest in these transactions, purposely availed himself of the privilege of conducting activities within North Carolina, and

² See *Buying Group, supra*, at 516.

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invoked in one aspect or another the benefit and protection of the laws of North Carolina.³ These were mutual promises and obligations entered into by people residing in the state and corporations chartered by the state. It was manifestly proper for the trial court to conclude that the maintenance of this suit in North Carolina against Bagley did not offend "traditional notions of fair play and substantial justice."⁴

Defendant argues that because he moved out of the state in 1975 and has not resided in the state since that time, the constitutionally required minimum contacts no longer exist and that these circumstances defeat jurisdiction. Defendant cites no authority for this proposition and we know of none. We hold that the minimum contacts standard can be reasonably applied only to the circumstances and events giving rise to the promises referred to in G.S. 1-75.4(5), and not to the circumstances giving rise to a breach. It does not seem reasonable to assume that the General Assembly intended the "long arm" of the statute to be cut off at the elbow by the mere transience of defaulting promisors. See *Pope v. Pope*, 38 N.C. App. 328, 331, 248 S.E. 2d 260, 262 (1978).

Defendant also argues that because defendant here is a guarantor of Johnston Mills' contract, his obligation, if any, to plaintiff is to pay the debt of another and not to pay for plaintiff's services — *ergo*, Bailey is not a "defendant" who has promised to pay for services, as that term is used in the statute. It is settled law that a guarantee of payment is an absolute promise, a direct and original undertaking by one person to answer for the payment of a debt *or the performance of some contract or duty* in case of default of another person who is liable for such payment *or performance* in the first place. See *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972); *SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E. 2d 274, 279, *disc. rev. denied*, 298 N.C. 204, — S.E. 2d — (1979). It is, therefore, clear, and we so hold, that as a guarantor of the contract with Johnston, Bagley is a defendant within the meaning of G.S. 1-75.4(5)(a), (b) and (c).

Defendant also argues that if the court did not have *in personam* jurisdiction over Bagley, service by registered mail under G.S. 1A-1, Rule 4(j)(9)b of the Rules of Civil Procedure was invalid. In that we

³ See *Buying Group*, *supra*.

⁴ *International Shoe Co. v. Washington*, *supra*, 90 L.Ed. at 102.

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have found *in personam* jurisdiction, this argument is without merit.

We hold that the trial court had *in personam* jurisdiction over the defendant Bagley in this case, that Bagley was properly served with process in this case, and that the order of the trial court should be and is

Affirmed.

Judges VAUGHN and MARTIN (Robert) concur.

STATE OF NORTH CAROLINA v. GREGORY DEAN PATTERSON

No. 8025SC497

(Filed 6 January 1981)

1. Homicide § 28.5— defense of another — sufficiency of evidence to require instruction

The evidence in a homicide case was sufficient to require an instruction on the right of defendant as a private citizen to interfere with and prevent the victim from committing a felonious assault on another where defendant presented evidence tending to show that the victim had dated one Theodora Hunter for several years and that she had a child by him; the victim had a history of altercations with other men whom Ms. Hunter dated, including two incidents involving guns and one incident in which the victim had cut another man with a knife; defendant had been dating Ms. Hunter; on the date in question defendant drove his car to Ms. Hunter's home; the victim pulled his car in front of defendant's car and the two engaged in an argument; the victim told defendant he was going to get his gun and go in the house and beat Ms. Hunter; defendant saw the victim with his hand in his pocket and thought he had a gun; defendant was frightened for both himself and Ms. Hunter because he knew the victim had threatened their lives several times and thought he had to try to stop the victim as best he could; as the victim went toward Ms. Hunter's house defendant "ran around to the corner of the house" and shot the victim twice, whereupon the victim "staggered as if he had been hit"; the victim then ran into the house and defendant stuck his arm through the door and fired three to five more times.

2. Homicide § 28.5— instructions — final mandate — not guilty by reason of defense of another

The trial court in a homicide prosecution erred in failing to include not guilty by reason of defense of another in the final mandate to the jury, and such error was not caused by discussion of the law of defense of another in the body of the charge.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 24 October 1979 in Superior Court, CATAWBA County. Heard in the Court

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of Appeals 9 October 1980.

Defendant was charged in a proper bill of indictment with the 2 March 1976 murder of Michael Millsaps. The jury in defendant's initial trial returned a verdict of guilty of second degree murder. The North Carolina Supreme Court found error in the charge to the jury and ordered that defendant be awarded a new trial. *State v. Patterson*, 297 N.C. 247, 254 S.E.2d 608 (1979).

The stipulations entered at defendant's first trial were made a part of the record of this re-trial. These included a stipulation "[t]hat Michael Millsaps died March 2, 1976, as a proximate result of gunshot wounds inflicted upon him by the defendant . . ." Defendant thus did not attempt to deny that the victim's death ensued from defendant's acts; rather, he sought through his evidence to establish a defense of self-defense or defense of another.

In summary, the evidence at trial tended to show that the victim had dated one Theodoria Hunter for several years and that she had a child by him; that the victim had a history of altercations with other men whom Ms. Hunter dated; that defendant had been dating Ms. Hunter; that on 2 March 1976 defendant drove his car to Ms. Hunter's home; that the victim pulled his car in front of defendant's and the two engaged in an argument; that the victim indicated to defendant that he was going to go into the house and beat Ms. Hunter; that defendant saw the victim with his hand in his pocket and thought he had a gun; that as the victim went toward Ms. Hunter's house defendant "ran around to the corner of the house" and shot at the victim twice, whereupon the victim "staggered as if he had been hit"; that the victim then "ran into the house," and defendant "stuck his arm through the door and fired three (3) to five (5) more times"; that "the deceased, just before he was shot, could have been proceeding towards the Defendant or towards the house"; and, as stipulated, that the victim died as a result of the wounds inflicted by defendant.

The jury returned a verdict of guilty of voluntary manslaughter. From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Alfred N. Salley, for the State.

Sigmon and Sigmon, by C. Randall Isenhower, for defendant appellant.

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WHICHARD, Judge.

Defendant contends the trial court erred in failing to instruct in its final mandate to the jury as to the defense of "defense of another."

The principle of law is well settled in this jurisdiction that "[i]f the defendant * * * had a well-grounded belief that a felonious assault was about to be committed on * * * (another), he had the right and it was his duty as a private citizen to interfere to prevent the supposed crime." *State v. Hornbuckle*, 265 N.C. 312, 315, 144 S.E.2d 12, 14 (1965), *quoting from State v. Robinson*, 213 N.C. 273, 282, 195 S.E. 824, 830 (1938). Defendant offered by his own testimony, in attempting to establish that his assault on the deceased, Michael Millsaps, was motivated by "a well-grounded belief that a felonious assault was about to be committed" by Millsaps upon Ms. Hunter, evidence tending to show the following:

The defendant "started going with" Ms. Hunter shortly after July, 1975. He first became aware of Millsaps when Millsaps came to defendant's apartment on an occasion when Ms. Hunter was there, and Millsaps "was pointing his finger in Ms. Hunter's face and shoving her." Later that day Ms. Hunter told defendant she had dated Millsaps, and that he had "started some trouble" with some other men she had dated. When she was dating one of these men, there had been an incident in which Millsaps had come around with a gun "and [the man] had to get his gun." Millsaps had cut with a knife another man Ms. Hunter had dated, and had had an incident in which "a gun was involved" with a third.

On the date defendant shot Millsaps defendant had driven his car to Ms. Hunter's house. Millsaps "drove up and blocked in the Defendant." When defendant tried to start his car, Millsaps grabbed defendant's car keys and "started beating on the Defendant," saying "he was going to kill the Defendant." Millsaps "told the Defendant that he . . . was going to his car, *get his .44 magnum gun and then go into the house and beat Ms. Hunter.*" He was going to 'kick her ass'. " The defendant "was frightened for both himself *and Ms. Hunter* because he knew that Michael Millsaps had threatened *their* lives several times." Defendant saw Millsaps getting out of his car "with his hand down in his pants" and he "thought . . . Millsaps had a gun." Defendant thought "at that time, his *and Ms. Hunter's* lives were in danger, and . . . he had to try to stop Millsaps as best he could."

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Defendant “*thought Ms. Hunter’s life was in danger* because . . . Millsaps said he was going to kick her ass and because he had beaten Ms. Hunter a number of times [S]he had told [him] of Millsaps’ beating her in the past.” (Emphasis supplied *passim*.)

[1] This evidence “was sufficient to require an instruction as to the right of the defendant as a private citizen to interfere with and prevent the prosecuting witness from committing a felonious assault” on Ms. Hunter. *Hornbuckle*, 265 N.C. at 314, 144 S.E.2d at 13. G.S. 15A-1232, like former G.S. 1-180,

requires that the trial judge fully instruct the jury as to the law based on the evidence in the case. It is the duty of the court to charge the jury on all substantial features of the case arising on the evidence without special request therefor. (Citations omitted.) And all defenses presented by defendant’s evidence are substantial features of the case.

State v. Dooley, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974).

[2] The trial court, in recognition of this duty, fully instructed the jury on the defense of another in the main body of the charge. It failed to do so, however, in its final mandate to the jury, the pertinent portion of which was as follows:

So, members of the Jury, I charge you that if you find from the evidence, beyond a reasonable doubt, that on or about the 2d of March, 1976, Gregory Patterson, intentionally and with malice and without justification or excuse, shot Michael Millsaps with a .22 Caliber pistol, a deadly weapon, thereby proximately causing Michael Millsaps’ death, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find or you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder. If you do not find the Defendant guilty of second degree murder, you must consider whether or not he is guilty of voluntary manslaughter and if you find from the evidence, beyond a reasonable doubt, that on or about the 2d day of March, 1976, Mr. Patterson intentionally and without justification or excuse, shot Michael Millsaps, with a .22 Caliber pistol, a deadly weapon, thereby proximately causing Michael Millsaps’ death, but the State has failed to satisfy

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you beyond a reasonable doubt that the Defendant acted with malice because it has failed to satisfy you beyond a reasonable doubt that Mr. Patterson did not act in heat of passion upon adequate provocation or because it has failed to satisfy you beyond a reasonable doubt that Greg Patterson did not act in self defense, but the State has proven beyond a reasonable doubt that Mr. Patterson used excessive force in his self defense, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty unless the State has satisfied you beyond a reasonable doubt, either first, that Greg Patterson did not reasonably believe under the circumstances as they existed at the time of the killing, that he was about to suffer death or serious bodily injury at the hand of Millsaps, or second, that Greg Patterson used more force than reasonably appeared to him to be necessary, or third, that Greg Patterson was the aggressor, then the killing of Millsaps by Greg Patterson would be justified on the ground of self defense and it would be your duty to return a verdict of not guilty.

In *Dooley* our Supreme Court held that the failure to include an instruction on self-defense in the trial court's final mandate to the jury was not cured by discussion of the law of self-defense in the body of the charge and that such failure was prejudicial error entitling the defendant to a new trial. The Court said, per Justice Moore:

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case.

258 N.C. at 165-166, 203 S.E.2d at 820. See also *State v. Messimer*, 237 N.C. 617, 75 S.E.2d 540 (1953); *State v. Hall*, 31 N.C. App. 34, 228 S.E.2d 637 (1976); *State v. Girley*, 27 N.C. App. 388, 219 S.E.2d 301

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(1975) *disc. review denied* 289 N.C. 141, 220 S.E.2d 799 (1976).

In 1 Strong's North Carolina Index 3d, *Assault and Battery* § 15.5, at 511-512, we find, with supporting citations, the following:

The court must submit the defense of self-defense, or defense of home, *or defense of others* when raised by defendant's evidence, notwithstanding the state's evidence to the contrary, and must charge thereon *in each portion of the instructions in which the question is germane*. (Emphasis supplied.)

The symmetry of our law would be skewed severely, and logic would be defied, were instructions to be required in the final mandate to the jury as to the mitigating circumstance of self-defense but not as to the mitigating circumstance of defense of others. These defenses are clearly the same in nature, and the rationale for requiring instructions in the final mandate as to one applies with equal force as to the other. Further, the evidence here tending to establish the mitigating circumstance of self-defense was minimal at best, while there was a significant body of evidence from which the jury could have found the mitigating circumstance of defense of another. The jury could have assumed from the fact that the court charged in its final mandate on self-defense, but not on defense of another, that a verdict of not guilty by reason of self-defense was a permissible verdict, while a verdict of not guilty by reason of defense of another was not.

We regret the necessity of requiring yet a third trial of this matter, but the trial court's failure to include an instruction in its final mandate allowing the jury to find defendant not guilty by reason of defense of another was prejudicial error entitling defendant to a new trial. Because we make this disposition of defendant's appeal, we deem it unnecessary to discuss the other errors assigned.

New trial.

Judges CLARK and WEBB concur.

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STATE OF NORTH CAROLINA v. RUSSELL WAGNER

No. 807SC689

(Filed 6 January 1981)

1. Infants § 17— statement to officers prior to arrest — admissibility

Statements given by defendant to investigating officers prior to his arrest were admissible, since no fact brought out on voir dire examination indicated that defendant was not clearly informed of his rights or that he did not understand his rights and did not waive his right to remain silent, to have the advice and presence of a lawyer, or to have a parent present, and defendant gave his statement freely and voluntarily without fear and without promise of favor.

2. Homicide §§ 21.7, 21.9— insufficiency of evidence of second degree murder and voluntary manslaughter — sufficiency of evidence of involuntary manslaughter

Evidence was insufficient to be submitted to the jury on charges of second degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaughter where the evidence tended to show that defendant, a 16 year old boy, shot his 10 year old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing; defendant was "messaging around with a shotgun"; and the gun accidentally went off.

3. Criminal Law § 118— contentions of parties — jury instructions prejudicial

The trial court's instructions to the jury were prejudicial where the trial court did not summarize the evidence as required by G.S. 15A-1232, but instead consistently and without exception stated the contentions of the parties, and in stating the State's contentions, included matters that were not in evidence.

APPEAL by defendant from *Small, Judge*. Judgment entered 8 February 1980 in Superior Court, WILSON County. Heard in the Court of Appeals 3 December 1980.

Defendant, a sixteen year old boy, was indicted for the murder of his ten year old sister. At arraignment, the State announced that it was seeking a verdict of second degree murder or any lesser degree. Defendant entered a plea of not guilty. He was convicted of voluntary manslaughter, and from judgment entered on the verdict, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Farris, Thomas & Farris, P.A., by Robert A. Farris, for defendant appellant.

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WELLS, Judge.

Defendant has assigned the following as error: the failure of the trial court to order certain testimony stricken from the record; the admission of defendant's pre-arrest statement to police officers; the trial court's refusal to allow certain testimony on cross examination of a witness for the State and a witness for the defendant; errors in the court's instruction to the jury; and the failure of the trial court to allow defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence. We will discuss three of the assignments.

[1] We hold that the defendant's statements given to the investigating officers prior to his arrest were admissible. No facts brought out on *voir dire* examination indicated that defendant was not clearly informed of his rights, or that he did not understand his rights, and did not waive his rights to remain silent, to have the advice and presence of a lawyer, or to have a parent present. Defendant gave his statement freely and voluntarily without fear and without promise of favor.

[2] We hold that there was insufficient evidence to take this case to the jury on second degree murder and voluntary manslaughter. Our Supreme Court has had many occasions to define the various degrees of homicide prevailing under the law of our state. An examination of these definitions is a helpful starting point in our analysis of this case. We find *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971) and *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978) helpful. We quote from *Wrenn*:

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; State v. Lamm, 232 N.C. 402, 61 S.E. 2d 188 (1950). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Bengé*, 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Foust*, *supra*; *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155

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(1930).

State v. Wrenn, supra, at 681-82, 185 S.E. 2d at 132, *quoted with approval in State v. Wilkerson, supra*, at 577-78, 247 S.E. 2d at 915.

Justice Bobbitt commenting further on these elements in *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955), said:

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *State v. Gregory*, 203 N.C. 528, 166 S.E. 387, where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory* case it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing*, is not used in the sense that a specific intent to *kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. [Citations omitted.] A specific intent *to kill*, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. [Citation omitted.] The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.*, from an accidental discharge of a shotgun.

State v. Gordon, supra, at 358-59, 85 S.E. 2d at 323-24 *quoted with approval in State v. Wrenn, supra*, at 682-83, 185 S.E. 2d 133.

In showing the events leading up to and preceding the tragic death of Melissa Wagner, the State relied entirely on the voluntary statements of the defendant. The State's witnesses testified that defendant's first statement in its entirety, was as follows:

"I didn't go to school today. Missy came home about three-thirty or twenty-five after three. We started play fussing about the tea in the refrigerator. She said, 'You drunk up all the tea'.

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I said, 'Yeah, but there is some lemonade on the counter.'

I went in the kitchen and we started messing around just playing. We were messing around with the shotgun. She walked in the living room. I had the gun up at the ceiling. I didn't think it was loaded. I didn't know the hammer was pulled back. We were just messing and I had it pointed at the living room. I held it loose. I didn't see her in the living room. *The gun accidentally went off and that's what happened.* I laid the gun down and went over to her and knelt down. Then I put the gun back up. Then I went to Mrs. Lamm's and called the police."

(Emphasis ours.)

Defendant's second statement in its entirety, as testified to by the State's witness, was as follows:

"I was sitting in the living room when she came home from school, between twenty-five after three and twenty-five to four. She looked in the refrigerator and said, 'You drank all the tea'. I said, 'Yeah'. I said, 'There is some lemonade on the counter'.

She said, 'I don't see no lemonade'.

I said, 'It's on the counter by the sink'.

She said, 'Did you make it?'

I said, 'Yeah'.

Then she said, 'If you made it, I'll get some water'.

Then I went in the kitchen and started messing with the gun. I got it from propped up against the kitchen window. I had it up and she said, 'It ain't loaded'. I said, 'Yes it is', and showed her, opened the gun. *I didn't know it was cocked.* Then she went in the living room by the fan or the television. I was standing watching TV from the kitchen door. She walked back to the chair and she must have turned around to fix her skirt or something *and that's when it went off.* It was under my arm pointed towards the living room, towards the TV. I think the Guiding Light was going off. I put the gun down on the table and went over and knelt down and felt of her neck to see if there was a pulse. I must have took the shell out and when I went outside, I ran around like a chicken with its head cut off, threw the shell in the cornfield, went back through the house and put the gun back in the gun cabinet. Then

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I went to Mrs. Lamm's across the street and called the police. I called the ambulance two times and nobody answered. Mrs. Lamm had the number written in the phone book."

(Emphasis ours.)

The State introduced no other evidence which would tend to throw a different light on the circumstances of the homicide *as those circumstances relate to defendant's intent to fire the weapon at all, much less at his sister*. Defendant's statements pertaining to the discharge of the weapon tend to show an accidental firing and tend to exculpate defendant on the elements of an intentional use of the weapon, entitling him to a dismissal of the charge of second degree murder and voluntary manslaughter. "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972). *See also State v. Hankerson*, 288 N.C. 632, 637, 220 S.E. 2d 575, 580 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). *Compare State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953).

Our review of the record shows that the evidence was sufficient to take the case to the jury on the charge of involuntary manslaughter.

[3] While not dispositive of this case, one other assignment of error needs to be discussed. In his charge to the jury, the trial court did not summarize the evidence as required by G.S. 15A-1232, but instead consistently and without exception stated the contentions of the parties. In stating the State's contentions, he included matters that were not in evidence. As pointed out by this Court in *State v. Moore*, 31 N.C. App. 536, 541-42, 230 S.E. 2d 184, 186-87 (1976), such instructions are prejudicial, and in this case entitle defendant to a new trial.

For the reasons stated, we hold that defendant is entitled to a New Trial.

Judges VAUGHN and MARTIN (Robert) concur.

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ANNIE GREENE DYER, PLAINTIFF V. MACK FOSTER POULTRY & LIVESTOCK, INC., EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

(Filed 6 January 1981)

Master and Servant § 55.1 — workers' compensation — more lifting required of employee than usual — no accident

Evidence was sufficient to support a finding by the Industrial Commission that there was "no interruption of [plaintiff's] work routine or the introduction of some new circumstance not a part of the usual work routine," the fact that plaintiff was filling in for absent employees and therefore engaged in a greater volume of lifting than was her ordinarily assigned task not rendering her performance at the time of the injury other than "a part of the usual work routine."

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission, by Commissioner Robert S. Brown, filed 17 December 1979. Heard in the Court of Appeals 7 October 1980.

Plaintiff seeks to recover benefits under the Workers' Compensation Act for an injury to her back incurred while working for defendant-employer. The parties stipulated that the employer-employee relationship existed between plaintiff and defendant-employer, and that defendant Travelers Insurance Company was the carrier on the claim.

The evidence on behalf of plaintiff tended to show that she was working for defendant-employer on 9 September 1977. Her duties were "packing eggs, grading eggs, and lifting boxes." The plaintiff further described her duties as follows:

When I packed eggs, I would take boxes and put twelve eggs in each box and pack until I got 45 cartons in each case. Then I would lift the cases and put them on top of each other.

On 9 September 1977 plaintiff "was running the packers all day." "There were four packers to run", and ordinarily three people operated the four packers. Plaintiff ordinarily operated only two packers and "helped keep up the tables." On this date, however, she "was assigned to work the four packers because [the employer was] short two girls." Plaintiff testified that "[t]he effect of this was that it was more work . . . heavier lifting and harder work and faster work and more straining to reach." She had never previously run all four

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packing machines for any length of time.

Plaintiff commenced work on 9 September 1977 at 7:00 a.m. At about 4:00 or 5:00 p.m. she "felt a catch in [her] back." She continued to experience pain in her back for which she eventually went to a doctor on or about 14 September 1977. On or about 18 September 1977 she was admitted to the hospital. After a week of therapy which produced no improvement, a disc was surgically removed from plaintiff's back.

The defendants offered no evidence. The Hearing Commissioner made a finding of fact (actually a mixed finding of fact and conclusion of law) that:

Plaintiff did not at the time complained of sustain an injury by accident arising out of and in the course of her employment. Although she was injured, said injury was not as a result of an accident. There was no interruption of her work routine or the introduction of some new circumstance not a part of the usual work routine except that she was working faster than usual on the occasion in question and felt a catch in her back.

He thus denied plaintiff's claim for compensation. Plaintiff appealed to the Full Commission which affirmed and adopted the Opinion and Award of the Hearing Commissioner. Plaintiff appeals to this Court from that decision.

Brewer and Freeman, by Paul W. Freeman, Jr., for plaintiff appellant.

No brief filed for defendant-employer.

No brief filed for defendant-carrier.

WHICHARD, Judge.

It is well-established in this jurisdiction that

[u]nder the [Workers'] Compensation Act, the North Carolina Industrial Commission is constituted the agency to hear evidence, resolve conflicts therein, make findings of fact, and state its conclusions. If the findings are supported by competent evidence, they are conclusive on the courts.

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Jackson v. Highway Commission, 272 N.C. 697, 700, 158 S.E.2d 865, 867 (1968). Applying this principle to the evidence in the record here, we find the following:

The plaintiff testified that it was a part of her normal work routine to operate the packers and to lift the packed cases, placing them on top of each other. She testified: “[A]s we get these boxes full, we stack [them] up; and that’s what I was doing when I had this catch in my back. I was packing big eggs.” She further testified: “I was reaching down getting the eggs. I was stooping down. *The day before when I picked up the flats of eggs I stooped down then.*” (Emphasis supplied.) Finally, she testified: “I reached down to get my eggs and when I reached down, I couldn’t get back up. *I guess it was the same way I had reached down before.*” (Emphasis supplied.)

We find that the testimony of plaintiff quoted above clearly constituted competent evidence from which the Hearing Commissioner (and the Full Commission by adoption) could have found that there was “no interruption of [plaintiff’s] work routine or the introduction of some new circumstance not a part of the usual work routine.” The finding is thus binding on this Court.

The Opinion and Award of the Full Commission found the Opinion and Award of the Hearing Commissioner to be “a proper application of the law of this State to the facts of record”, citing *Reams v. Burlington Industries*, 42 N.C.App. 54, 255 S.E.2d 586 (1979). In *Reams* the plaintiff’s duties “consisted of lifting bales of cloth weighing 70 to 80 pounds, placing them on a measure graft, inspecting the cloth, and removing the bales from the measure graft.” *Reams*, 42 N.C.App. at 55, 255 S.E.2d at 587. Plaintiff ordinarily inspected no more than 30 bales of cloth per day. On the date his injury occurred another employee was absent from work, and plaintiff was asked to perform the absent employee’s duties. Plaintiff performed these duties for approximately two hours during which he handled approximately 100 bales of cloth, and then informed his supervisor he could no longer perform the job. He subsequently discovered that he had suffered a ruptured intervertebral disc. This Court affirmed the Industrial Commission’s order which concluded that the plaintiff did not “sustain an injury by accident” within the meaning of section 97-2 (6) of the Worker’s Compensation Act, stating,

We do not think that the mere fact that the plaintiff was performing a task for his employer which involved a *greater volume of lifting* than his ordinarily

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assigned task may be taken as an indication that an injury he sustained while performing the work was the result of an accident within the meaning of the Act.

Reams, 42 N.C.App. at 57, 255 S.E.2d at 588 (emphasis supplied).

The only basis we find for distinguishing the facts in this case from those in *Reams* is that here the plaintiff was performing the work of two other employees rather than one. We do not find that distinction sufficient to merit a different result. The evidence here permitted the Hearing Commissioner (and the Full Commission by adoption) to find facts on which to base a conclusion that this plaintiff, like the plaintiff in *Reams*, was, on the date her injury was incurred, simply engaged in "a greater volume of lifting than [was her] ordinarily assigned task." Under the decision in *Reams*, this would not render her performance at the time of the injury other than "a part of the usual work routine."

See also *Beamon v. Grocery*, 27 N.C.App. 553, 219 S.E.2d 508 (1975), and cases cited.

There being competent evidence to support the findings of the Hearing Commissioner which were adopted by the Full Commission, and the Full Commission having concluded correctly that the findings dictate a denial of plaintiff's claim by virtue of the decision of this Court in *Reams*, the decision of the North Carolina Industrial Commission is

Affirmed.

Judges CLARK and WEBB concur.

**WARD LUMBER COMPANY, A CORPORATION, PLAINTIFF v. JOHN C. BROOKS,
COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, DEFENDANT**

No. 8010SC530

(Filed 6 January 1981)

1. Attorneys at Law § 7.5— attorney fees — civil rights action

Where a claim is based on both a State statute which does not provide for recovery of attorney fees and on 42 U.S.C. § 1983, it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney

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fees under 42 U.S.C. § 1988. If the court does not address the § 1983 claim but decides the case on the basis of the State statute, the test for determining whether the prevailing party is entitled to attorney fees is whether there was (1) a substantial claim under § 1983 and (2) a common nucleus of operative facts.

2. Attorneys at Law § 7.5—attorney fees — civil rights action — failure to show substantial claim

Plaintiff corporation is not entitled to attorney fees pursuant to 42 U.S.C. §§ 1983 and 1988 in an action in which it was held that G.S. 95-136(a) is unconstitutional to the extent that it purports to authorize warrantless OSHA inspections of business premises and that an administrative inspection warrant for plaintiff's premises was not based on probable cause and was invalid where defendant voluntarily dismissed that portion of the administrative proceeding relating to a citation and proposed penalty for plaintiff's refusal to allow an inspection of its premises, plaintiff's place of business was not inspected during the pendency of this litigation, plaintiff was not deprived of any constitutional rights as a result of the invalid warrant, and plaintiff therefore failed to show a substantial claim under 42 U.S.C. § 1983 which would permit an award of attorney fees under 42 U.S.C. § 1988.

APPEAL by plaintiff from *Preston, Judge*. Order entered 13 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals, 4 December 1980.

This case is before us for the second time on appeal. The action was instituted by plaintiff Ward Lumber Company and five other individual plaintiffs under the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.*, and under 42 U.S.C. § 1983 (1978). It involved a challenge to warrantless OSHA inspections. Our previous opinion, *Gooden v. Brooks*, Comr. of Labor, 39 N.C. App. 519, 251 S.E. 2d 698 (1979), affirmed the trial court's dismissal for failure to state a claim upon which relief could be granted as to all plaintiffs except Ward Lumber Company. As to Ward Lumber Company, the appellant on this appeal, we held that it was entitled to a declaratory judgment that N.C. Gen. Stat. § 95-136(a) is unconstitutional to the extent that it purports to authorize warrantless inspections.

Defendant subsequently appealed our decision to the Supreme Court of North Carolina, which granted defendant's petition for discretionary review and denied plaintiff's motion to dismiss. *Gooden v. Brooks*, Comr. of Labor, 297 N.C. 299, 254 S.E. 2d 923 (1979). The record discloses that after the parties submitted briefs and after oral argument, the Supreme Court vacated its prior order granting discretionary review and dismissed the appeal. *Gooden v. Brooks*, Comr. of Labor, 298 N.C. 806, 261 S.E. 2d 919 (1979).

This appeal concerns the denial of plaintiff's request for attor-

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ney's fees. On 10 January 1980 plaintiff moved for summary judgment pursuant to our opinion at 39 N.C. App. 519, requesting injunctive and declaratory relief and the award of attorney's fees. Simultaneously, plaintiff filed a motion for fees under The Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1978). On 23 January 1980 the superior court granted the injunctive and declaratory relief requested and ordered that the matter be retained on the docket to determine plaintiff's entitlement to attorney's fees. On 15 February 1980 defendant filed a motion to dismiss the request for attorney's fees.

From an order granting defendant's motion to dismiss and denying plaintiff's motion for attorney's fees, plaintiff appeals.

Hugh Joseph Beard, Jr., for the plaintiff-appellant.

Attorney General Edmisten by Assistant Attorney General Tiare B. Smiley, for the defendant-appellee.

MARTIN (Robert M.), Judge.

The Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1978) provides:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[1] Attorney's fees may be recovered as part of costs in state court proceedings instituted to enforce provisions of 42 U.S.C. § 1983. *Ashley v. Curtis*, 67 A.D. 2d 828, 413 N.Y.S. 2d 528 (App. Div., 1979). Our previous opinion in this case at 39 N.C. App. 519 did not address the question of whether plaintiff had established a violation of 42 U.S.C. § 1983. Where a claim is based on both a state statute which does not provide for the recovery of attorney's fees and on 42 U.S.C. § 1983, it is not necessary that the court base its decision on § 1983 in order for the prevailing party to be entitled to attorney's fees under 42 U.S.C. § 1988. If the court does not address the § 1983 claim, but rather decides the case on the basis of the state statute, the test for determining whether the prevailing party is entitled to attorney's fees is two-pronged: (1) was there a substantial claim under § 1983 and (2) was

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there a common nucleus of operative facts. *Kimbrough v. Arkansas Activities Ass'n.*, 574 F. 2d 423 (8th Cir. 1978); *Seals v. Quarterly County Court, Etc.*, 562 F. 2d 390 (6th Cir. 1977); *Annot.*, 43 A.L.R. Fed. 243 (1979); *see also Southeast Legal Defense Group v. Adams*, 436 F. Supp. 891 (D. Ore. 1977). H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n. 7 (1976) states that where a court decides the case on the non-fee claim,

if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra*; [415 U.S. 528 (1974)] *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

[2] The court below found that 42 U.S.C. § 1988 was inapplicable to the relief obtained by the plaintiff pursuant to the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* The dispositive issue on this appeal, as plaintiff-appellant concedes in its brief, is "whether there was a substantial claim under Section 1983 and a common nucleus of operative facts between the 1983 claim and the Declaratory Judgment claim."

42 U.S.C. § 1983 (1978) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The record discloses that although a citation and notification of proposed penalty were issued to plaintiff, plaintiff contested the citation and proposed penalty and subsequently the defendant voluntarily dismissed that portion of the administrative proceeding related to plaintiff's refusal to honor the administrative inspection warrant. In addition, the record discloses that plaintiff's place of business was not inspected during the pendency of this litigation. Plaintiff therefore was not deprived of any constitutional rights as a

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result of the issuance of the invalid warrant. Simply stated, plaintiff has failed to show any deprivation of rights as required in order to claim relief under 42 U.S.C. § 1983. As plaintiff has failed to meet the first prong of the test referred to above, a substantial claim under 42 U.S.C. § 1983, and thus is not entitled to recover its attorney's fees under 42 N.C. U.S.C. § 1988, we will not address the issue of whether plaintiff has met the second prong of that test.

Our decision renders any possible error in the court's order dismissing plaintiff's motion for attorney's fees nonprejudicial.

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES RICHARD HERRING, JR.

No. 805SC551

(Filed 6 January 1981)

1. Assault and Battery § 14.3—assault with deadly weapon with intent to kill inflicting serious injury — sufficiency of evidence of intent to kill

The trial court properly denied defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury made on the ground that there was insufficient evidence of an intent to kill, since the evidence tended to show that defendant hit the victim in the face when she refused to have sexual intercourse with him, took her by the arms, and dragged her out of his truck; he subsequently hit her on the face and head with a tire tool several times; he picked her up and put her in the back of his truck, pulled her out and hit and kicked her several more times; while the victim was on the ground, defendant tore off all her clothes except a little piece of her blouse which was left hanging around her neck; and defendant placed the victim under a bush and left.

2. Rape § 18.2—assault with intent to commit rape — sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of assault with intent to commit rape made on the grounds that there was insufficient evidence for the jury to find that defendant intended to gratify his passion in all events whatever resistance the victim might make, since evidence of defendant's statement to the victim concerning his desire to have intercourse combined with his actions in removing her clothes and beating her when she refused was evidence from which the jury could find the requisite intent.

3. Rape § 18.2—assault with intent to rape — evidence of victim's prior beatings by husband excluded

In a prosecution for assault with intent to commit rape where defendant

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testified that the victim's husband had beaten her on earlier occasions, the trial court did not err in excluding testimony by a witness who had lived close to the victim five or six years earlier that, nearly every time he saw her she had a black eye or other injury and on one occasion had told him that her husband had stabbed her, since the testimony was offered to prove something that had happened several years prior to the time of the alleged incident and was collateral to the inquiry at the trial.

4. Assault and Battery § 5.3; Rape § 17— assault with deadly weapon with intent to kill inflicting serious injury — assault with intent to commit rape — no double jeopardy

Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape did not subject him to double jeopardy, since the elements for the two crimes are not the same.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 10 January 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 October 1980.

Defendant was tried for assault with a deadly weapon with intent to kill, inflicting serious injuries, and for assault with intent to commit rape. Evidence by the State tended to show: On 18 July 1979, defendant drank beer with Horace and Martha Platt in their home for approximately three hours. Between 7:00 and 7:30 p.m., the defendant asked the Platts if they would like to ride to Wilmington with him. Martha Platt accepted the invitation, and the defendant and she drove to a place called "Spider Web." From there, the two and another woman drove to the "Corner Bar." The defendant and Martha Platt left the "Corner Bar" alone and defendant drove to a graveyard off Highway 421. Once there, the defendant got out of the truck, walked to the door beside Mrs. Platt and asked her "if [she] wanted to screw and he asked if [she] wanted to suck him." When she said no, the defendant hit her in the face, took her by her arms and dragged her out of the truck. He subsequently hit her on the face and head with a tire tool several times; picked her up and threw her in the back of the pick-up truck; pulled her back out and hit and kicked her several more times. While Mrs. Platt was on the ground, he tore off all her clothes except a little piece of her blouse which was left hanging around her neck. Defendant placed Mrs. Platt under a bush and left. She was found approximately 24 hours later and taken by ambulance to a hospital. She remained at the hospital for six weeks, three of which were spent in the intensive care unit. She lost her vision in one eye, and had a series of operations as a result of her injuries.

Defendant testified that he had left Mrs. Platt at the "Corner

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Bar” and that Mrs. Platt had come to him on previous occasions saying that her husband had beaten her.

Defendant was found guilty as charged. From sentences imposed on both charges, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Ray H. Walton and William F. Fairley for defendant appellant.

WEBB, Judge.

[1] The defendant’s first assignment of error is to the overruling of his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant contends there was not sufficient evidence of an intent to kill to be submitted to the jury. In *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956), it was held that the jury could infer from a particularly vicious assault with a belt by an adult male on a three-year-old child that the defendant intended to kill the child. The Court, quoting *State v. Revels*, 227 N.C. 34, 40 S.E. 2d 474 (1946), said an intent to kill “may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.” We hold that under *Cauley*, the court in the case sub judice properly denied the defendant’s motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

Defendant also argues the conviction must be reversed under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). In that case the United States Supreme Court held that a federal court in reviewing a conviction in a state court would set aside the conviction if it was found that a rational trier of fact could not find the defendant guilty beyond a reasonable doubt from the evidence. We hold a rational trier of fact could find beyond a reasonable doubt the defendant guilty of assault with a deadly weapon with intent to kill resulting in serious injury in the case sub judice.

[2] Defendant next contends it was error not to dismiss the charge of assault with intent to commit rape because there was not sufficient evidence for the jury to find the defendant intended to gratify his passion in all events whatever resistance Mrs. Platt might make. We hold that the evidence of defendant’s statement to Mrs. Platt concerning his desire to have intercourse combined with his actions in remov-

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ing her clothes and beating her when she refused is evidence from which the jury could find the requisite intent. It was only necessary for the defendant to have formed the intent. He did not have to retain it throughout the assault. *See State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971) and *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972).

[3] The defendant next contends that the exclusion of certain testimony was error. On cross-examination, Mrs. Platt testified as follows:

“It is not a fact that I have been severely beaten by Mr. Platt on numerous occasions. I have been beaten by Mr. Platt. I have had him locked up on one time . . . I have not been beaten many more times than that. I was not severely beaten by Mr. Platt when we lived in Delco. Mr. Platt has never been convicted . . . of assaulting me.”

The defendant testified that he had seen Mrs. Platt on several occasions when she had been beaten. The defendant called a Mr. Little as a witness who testified he lived close to the Platts in 1973 or 1974. The court excluded testimony by him that “[a]bout every time I seen her she had a black eye or something — a cut lip” and on one occasion she had told him her husband had stabbed her. The defendant contends it was error to exclude this testimony. He contends this proffered testimony would have corroborated the defendant’s testimony and should have been admitted. He contends further that if it was not admitted to corroborate the defendant, it should have been admitted to impeach Mrs. Platt.

We hold it was not error to exclude the testimony of Mr. Little. It was offered to prove something that had happened several years prior to the time of the alleged incident and was collateral to the inquiry at the trial. Mrs. Platt’s own testimony corroborated the testimony of the defendant that her husband had beaten her on previous occasions. We hold that Mr. Little’s testimony was so remote that it was not error to exclude it.

[4] The defendant’s last assignment of error is to the trial and sentencing on the two charges of assault with a deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape. Defendant contends conviction and sentences on both charges subjected the defendant to double jeopardy. The elements for

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the two crimes are not the same. Although both charges grew from the same incident, it was not error to convict the defendant for both of them. *See State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

No error.

Judges CLARK and WHICHARD concur.

JAMES M. VERNON AND WIFE, ELIZABETH VERNON v. DURWOOD KENNEDY AND WIFE, JANET S. KENNEDY

No. 808SC493

(Filed 6 January 1981)

Landlord and Tenant § 14—lease with option to purchase — holding over — option not extended

Where plaintiffs' lease expired and could not be extended beyond 30 April 1973 but plaintiffs continued to hold over, plaintiffs were at best tenants from year to year under the applicable terms of the expired lease, and an option to purchase provided in the lease could not be construed as applicable to the tenancy from year to year since, by its own terms, the option was limited to "the term of this lease or the extended period thereof," and an attempt to exercise the option in 1979 would come outside the extended terms of the lease.

APPEAL by plaintiffs from *Peel, Judge*. Judgment entered 7 February 1980 in Superior Court, WAYNE County. Heard in the Court of Appeals 13 November 1980.

This is an action for specific performance of an option to purchase contained in a written lease executed by the parties on 4 May 1971. The term of the lease was one year. The lease further provided, in relevant part:

"6. It is understood and agreed that the parties of the second part shall have the right to extend the term of this lease for an additional period of one (1) year, beginning on the first day of May, 1972, provided the parties of the second part notify, in writing, the said parties of the first part of their intention to extend same, said notice to be given at least thirty (30) days prior to the 30th day of April, 1972

7. And it is further agreed that provided all rentals there-

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tofore due have been paid, the parties of the second part may at any time during the term of this lease or extended period thereof elect to purchase said property”

This action was commenced 21 November 1979.

Defendants filed with their answer a motion for summary judgment. In their affidavit defendants state that plaintiffs never gave notice of an intention to extend the period of the lease as required under paragraph 6 thereof.

Elizabeth Vernon’s affidavit states that on 1 November 1979 plaintiffs gave defendants written notice of their intention to exercise the option to purchase contained in paragraph 7 of the lease.

Summary judgment was entered against plaintiffs.

Douglas P. Connor for plaintiff appellants.

Kornegay & Rice by Robert T. Rice for defendant appellees.

CLARK, Judge.

Plaintiff may not recover under the lease as a matter of law. The lease provides, at an absolute maximum, for a term of two years, even assuming the giving of proper notice. The lease could thus under no circumstances continue in force after 30 April 1973.

Plaintiffs point out in their brief that our Supreme Court, in considering a somewhat similar situation, has stated that

“when a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term the lessor may eject him or recognize him as a tenant. (Citation omitted). If the lessor elects to treat him as a tenant, *a new tenancy relationship is created* as of the end of the former term. This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease *in so far as they are applicable*” (Emphasis added.)

Kearney v. Hare, 265 N.C. 570, 573, 144 S.E. 2d 636, 638 (1965). We believe the foregoing is an accurate statement of the law. Under this law the plaintiffs, having presented no facts to rebut the presumption, were at best tenants from year to year under the applicable terms of the expired lease.

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The option term in paragraph 7 of the lease cannot be construed as "applicable" to the tenancy from year to year for the reason that by its own terms, paragraph 7 is limited to "the term of this lease or the extended period thereof." Since the lease, again by its own terms, could not be extended beyond 30 April 1973, an attempt to exercise the option in 1979 would come outside the extended term of the lease.

Were the lease still in effect, the option would remain in effect. The law, however, is that "a new tenancy relationship[was]created." *Id.* This new tenancy may be substantially similar to the original lease relationship, but it will not include terms from the former lease that were expressly limited to the effective period of the lease itself.

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA, EX REL, COMMISSIONER OF INSURANCE, APPELLEE V. NORTH CAROLINA RATE BUREAU, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FIDELITY & GUARANTY INSURANCE UNDERWRITERS, TRAVELERS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, PENNSYLVANIA, NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, APPELLANTS IN THE MATTER OF A FILING DATED NOVEMBER 27, 1979 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED WORKERS' COMPENSATION INSURANCE RATES DOCKET NO. 314

No. 8010INS506

(Filed 6 January 1981)

APPEAL by North Carolina Rate Bureau from Order of North Carolina Commissioner of Insurance dated 25 February 1980. Heard in the Court of Appeals 2 December 1980.

Attorney General Edmisten by Assistant Attorney General Richard L. Griffin for appellee.

Young, Moore, Henderson & Alvis by Charles H. Young and George M. Teague for defendant appellants.

CLARK, Judge.

On 27 November 1979 the Rate Bureau made a filing for revised workers' compensation insurance rates proposing an indicated need

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for a 24.3% increase in the overall level of workers' compensation rates and rating values, but the proposed increase was limited to 6% pursuant to G.S. 58-124.26. The Rate Bureau appeals from the order of the Commissioner of Insurance disapproving substantially the entire rate increase proposed in the filing.

The brief of the Commissioner concedes that the questions presented in this appeal are either directly controlled or rendered moot by two decisions of the North Carolina Supreme Court, both filed 15 July 1980 and entitled "Commissioner of Insurance v. North Carolina Rate Bureau," one printed in 300 N.C. 381, 269 S.E. 2d 547, and the other in 300 N.C. 485, 269 S.E. 2d 602.

In view of the concessions made by the Commissioner, his Order dated 25 February 1980, is vacated and set aside, and the filing as limited by G.S. 58-124.26 is approved, and it is ordered that all escrowed premium funds be distributed to the member insurers pursuant to G.S. 58-124.22(b).

Reversed and Vacated.

Judges HEDRICK and WHICHARD concur.

ARLENE R. HARRIS v. HAROLD R. HARRIS

No. 8012DC510

(Filed 20 January 1981)

1. Trial § 42.2— question by jury — insufficiency to show quotient verdict

In an action to enforce an agreement to pay alimony, the jury's question as to whether a finding that defendant did not have sufficient mental capacity to enter into the agreement would "completely throw out the contract, or can they draw up a new contract" did not show that the jury's verdict awarding plaintiff only \$1.00 for defendant's breach of the agreement was a compromise or quotient verdict.

2. Trial § 46— impeaching verdict — affidavit of juror

A juror's affidavit was incompetent to impeach the jury's verdict after the jury had been discharged.

3. Trial § 42.2— quotient verdict — insufficient showing

A jury's verdict finding that defendant breached an agreement for payment of alimony but awarding plaintiff only \$1.00 for such breach did not itself show that it was reached as the result of a quotient or compromise where defendant asserted a

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set-off to the amount of alimony he owed under the agreement and the verdict indicates that the jury believed and applied defendant's evidence of a set-off.

4. Divorce and Alimony § 21; Husband and Wife § 13— specific performance of separation agreement

The fact that plaintiff allowed an adult boyfriend to live with her in her house with a minor child did not constitute a breach of her separation agreement with defendant which would prohibit the court from ordering specific performance of the agreement, and the court did not err in entering specific performance of the alimony provisions of the agreement where it found that defendant had made no alimony payments for some time and had given no indication that he intended voluntarily to make such payments in the future.

5. Husband and Wife § 10— consideration for separation agreement

Plaintiff wife furnished adequate legal consideration for defendant's promise in a separation agreement to pay alimony in a sum equivalent to 50% of his retirement pay each month where she covenanted to waive and relinquish all of her marital rights to share in the property or the estate of defendant and released all claims for support, maintenance and alimony except as specifically provided for in the agreement. Furthermore, the agreement was under seal and the seal imports consideration.

6. Evidence § 13— testimony by attorney — no violation of attorney-client privilege

Assuming that an attorney who prepared a separation agreement for plaintiff and defendant represented both parties, the attorney-client privilege was not violated by the attorney's testimony concerning her observation of defendant's physical condition or concerning matters discussed with defendant while plaintiff was present.

7. Husband and Wife § 10; Constitutional Law § 4— constitutionality of privy examination statute — husband's lack of standing to raise

Defendant husband had no standing to attack the constitutionality of the statute requiring a privy examination of the wife for a separation agreement, former G.S. 52-6, since the only proper remedy upon a finding of unconstitutionality would be to strike the privy examination requirement entirely, and such a holding would not benefit or affect defendant in any way since he still would not have been entitled to a privy examination; moreover, defendant was not unfairly prejudiced by the fact that his wife had a privy examination before entering into the separation agreement since he cannot show a specific, identifiable injury resulting therefrom.

8. Husband and Wife § 10.1— separation agreement — validity of alimony provision

A separation agreement was not manifestly unreasonable or unfair to defendant husband because it required him to pay to plaintiff wife one-half of his military retirement pay for life.

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9. Estoppel § 4.7; Husband and Wife § 10.1— estoppel to assert invalidity of separation agreement

The evidence was sufficient to present a jury question as to whether defendant husband was estopped from denying the validity of a separation agreement where defendant performed his obligations in the agreement by conveying a house to plaintiff wife and by making monthly payments of alimony for some 32 months, and where defendant accepted the benefits of the agreement, including the complete and final settlement of all marital and property rights with his wife, which enabled him to get a divorce and remarry without further complication.

APPEAL by defendant from *Cherry, Judge*. Judgment entered 16 November 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals 3 December 1980.

The court entered an order upon a verdict in plaintiff's favor directing defendant to perform the support provisions of a separation agreement.

Plaintiff and defendant were married in 1951 in Fort Worth, Texas. Three children were born of this marriage. During the early years of their marriage, plaintiff worked outside the home to pay the living expenses while defendant was a student at Virginia Polytech Institute. Defendant received a commission in the Army in 1952. After graduating from college in December 1953, defendant began a service of twenty-one years in the Army from which he retired in April 1974 with the rank of Lieutenant Colonel. The parties were subsequently divorced in June 1975, after twenty-four years of marriage.

The parties signed and sealed a separation agreement on 27 September 1974 in Cumberland County. At the time, they had been living separate and apart for seven months. In the agreement, plaintiff was given custody of the two minor children, and defendant promised to pay \$200.00 per month for the support of each of them. Plaintiff kept the house with all its furnishings, but was required to make the remaining payments thereon. Paragraphs seven and eight of the agreement further provided the following:

That the said Harold Richard Harris further agrees to pay to Arlene Ruth Harris as support for herself a sum equivalent to fifty percent (50%) of his United States Army retirement pay each month for his lifetime; and that as a part of her alimony and support, the said Arlene Ruth Harris is to receive the following additional property:

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- (1) The use and possession of the 1970 Toyota Custom Station Wagon on condition that Harold Richard Harris will transfer title to her at any time that she requests that he do so.
- (2) The coin collection.
- (3) All cash presently deposited in any regular bank account.
- (4) The possession and use of the travel trailer with the condition that she will loan it to Harold Richard Harris upon any reasonable request by him.

It is further covenanted and agreed that the said Harold Richard Harris is to have the following property:

- (1) All the silver bullion owned by the parties hereto.
- (2) Seven Thousand Dollars (\$7,000.00) in United States Certificates of Deposit in his name.
- (3) The 1970 Chevrolet Pickup.
- (4) The 1963 Buick Automobile.

Plaintiff filed a complaint against defendant on 12 May 1977 seeking damages for alleged arrearages in alimony, garnishment of defendant's military pay for alimony, specific performance of the separation agreement, attorney's fees and court costs. A default judgment was later entered in plaintiff's favor, but was vacated on 11 August 1977 upon defendant's motion and showing that he had obtained an extension of time to answer the complaint. Plaintiff's prayer for garnishment was later dismissed upon the motion of the United States as defendant garnishee. This dismissal was affirmed by the Court of Appeals in civil case No. 7812DC295 on 14 March 1978.

The action was tried by a jury on the issues of defendant's mental capacity to enter into a contract on 27 September 1974 when he signed the agreement, whether he had breached the contract to pay alimony, and the amount of damages owed to plaintiff if any. Defendant's evidence was that he lacked mental capacity to enter the contract because he was taking strong medication for stomach cramps and that he did not understand what he was doing because he did not have legal counsel. Plaintiff presented evidence tending to show that defendant did have sufficient mental capacity to enter into a valid, binding agreement and that both parties were represented by the same counsel, Elizabeth Fox. As to the question of alleged arrearages owed by defendant in alimony, it was stipulated that between 27

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September 1974 and 12 May 1977, defendant received \$36,526.00 in retirement income, and plaintiff was entitled to \$18,263.00 of that amount by the separation agreement. Defendant had only paid plaintiff \$15,289.00 and was \$2,974.00 in arrears. The jury returned a verdict in plaintiff's favor, but awarded her only \$1.00 in damages for defendant's breaches between June 1977 and November 1979.

William J. Townsend, for plaintiff appellee.

Barringer, Allen and Pinnix, by Thomas L. Barringer, for defendant appellant.

VAUGHN, Judge.

This case arises from a complaint seeking enforcement of the contractual provisions of a separation agreement executed by the parties over six years ago. Defendant's main defense to the action was that he lacked the requisite mental capacity to enter such an agreement. The jury returned a verdict in plaintiff's favor, and the judge ordered specific performance of the agreement. Defendant, nevertheless, brings forward many assignments of error which he contends require a new trial or reversal of the judgment. We disagree and deny defendant's request for relief.

Defendant first attempts to impeach the jury verdict which was rendered as follows:

1. Did the defendant, Harold R. Harris, have sufficient mental capacity on September 27, 1974, to enter into contract?

Yes ~~X~~ No —

2. Is the contract enforceable despite the mental incapacity of Harold R. Harris?

Yes — No —

3. Did the defendant, Harold R. Harris, breach the contract for the payment of alimony, as alleged?

Yes ~~X~~ No —

4. What amount of damages, if any, has the plaintiff sustained?

\$ One Dollar (\$1.00)

Specifically, defendant contends that the jury's answer to issue number 3 is inconsistent with its answer to issue number 4 which raises a suspicion that the jury improperly returned a quotient or compromise verdict. Defendant's contention is based on a question

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asked by the jury during its deliberations and an affidavit of the jury foremen.

[1] Less than an hour after it had retired for deliberation, the jury returned to the courtroom to ask the following question: “We don’t know about this — they seem to think — they seem to think that if we can say no to this first question, would it completely throw out the contract, or can they draw up a new contract, or—.” The judge did not answer this question because, as he told the jury, it “presupposed certain things which you should not consider, and which are not proper for you to consider in your deliberations.” This exchange is insufficient to show that the subsequent decision reached by the jury was the result of a compromise or quotient verdict. It merely discloses that the jury was improperly concerned about the legal consequences of a particular finding they might make upon the facts, a concern which the trial judge promptly and correctly rebuked.

[2] Over two months later, the jury foreman revealed the following in a sworn affidavit.

After deliberating initially we were deadlocked with eight (8) Jurors voting to answer Issue Number One “Yes” and four (4) Jurors voting to answer Issue Number One “No.”

...

We were only able to break our deadlock by proceeding to Issue Number Four and voting unanimously to answer it “One Dollar (\$1.00).” We then returned to Issue Number One and the four Jurors who had been voting to answer that issue “No” changed their votes to answer it “Yes.”

A rule of long standing and sound judgment in this State prohibits the court’s receipt and consideration of a juror’s affidavit, after the jury has been discharged, for the purpose of impeaching or overthrowing its verdict. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966); 1 Stansbury, N.C. Evidence § 65 (Brandis rev. 1973). The foreman’s affidavit is, therefore, totally incompetent, and we shall disregard it.

[3] The issue thus becomes whether the verdict itself, as it stands, reveals that it was reached as the result of a quotient or compromise. A quotient verdict is one in which the jurors, in a civil action, agree to award an amount of damages equal to one-twelfth of the sum of their

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individual estimates of the measure of damages. *Highway Commission v. Matthis*, 2 N.C. App. 233, 163 S.E. 2d 35 (1968). A mere surmise by defendant that the verdict was reached by this process is insufficient to compel such a conclusion as a matter of law. *Collins v. Highway Com.*, 240 N.C. 627, 83 S.E. 2d 552 (1954). In *Highway Commission v. Matthis, supra*, the Court held, in accordance with the prevailing view, that evidence of papers and figures found in the jury room is insufficient to raise the presumption that the quotient process has been improperly used. In *Matthis*, the attorney found paper with twelve figures written down on it and divided by twelve which was equivalent to the exact amount of the verdict rendered. 2 N.C. App. at 250, 163 S.E. 2d at 46. Here, there is no evidence that the jury engaged in mathematical chicanery by quotient in its award of damages in the amount of \$1.00.

A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court. *Vandiford v. Vandiford*, 215 N.C. 461, 2 S.E. 2d 364 (1939). Defendant relies on *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974) to impugn, the validity of the verdict. *Robertson* was a negligence action in which the jury answered the liability issues of negligence and contributory negligence in plaintiff's favor but failed to award him damages for pain and suffering. The Supreme Court reversed and remanded for a new trial because of its "strong suspicion that the jury awarded no damages to the minor plaintiff as a result of a compromise on the first and second issues involving the question of liability." 285 N.C. at 569, 206 S.E. 2d at 196. *Robertson* is inapplicable to the instant case.

Superficially, the jury's verdict may seem inconsistent in its award of only \$1.00 for defendant's breach of the contract to pay alimony. Such an alleged inconsistency quickly disappears, however, upon a closer examination of the evidence presented by the parties and their contentions. Plaintiff's evidence was that defendant owed \$2,974.00 in arrearages due to his breaches of the contract between June 1977 and November 1979. Defendant asserted a set-off of at least \$2,000.00 to the amount of alimony he owed because he had paid child support to plaintiff in excess of that required by the agreement and had continued to pay support for a child after he had reached the age of majority. Viewed in this light, the jury verdict does not disclose a compromise but merely indicates that the jury believed (and applied) defendant's evidence of a set-off. *See also McAdams v. Moser*, 40 N.C.

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App. 699, 253 S.E. 2d 496 (1979). Thus, the jury awarded only nominal damages as the judge had instructed them to do if they found no evidence of actual damages. We hold that the verdict exhibits the required degree of consistency to be enforced, and it was not error for the court to deny defendant's motion to set aside the judgment on this ground.

[4] Defendant next contends that the court erred as a matter of law when it ordered specific performance of the separation agreement. A separation agreement that has not been incorporated into a divorce judgment may be equitably enforced by an order of specific performance. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); *Haynes v. Haynes*, 45 N.C. App. 376, 383, 263 S.E. 2d 783, 787 (1980); 2 Lee, N.C. Family Law § 201 (4th ed. 1980). Defendant, nonetheless, states that specific performance in any case may only be awarded if the party seeking it has alleged and proven that he (or she) has also performed his obligations under the contract. *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 283, 261 S.E. 2d 899, 907 (1980). It is unclear whether this requirement exists in the context of marital agreements. In *Moore, supra*, the Court did not mention whether the wife had performed her obligations and apparently proceeded solely on proof of the separation agreement itself. Nevertheless, it seems obvious that if the wife had materially breached her obligations thereunder, the husband would have strongly contended so, and the Court would have addressed the point. See *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980). In the instant case, however, we believe that plaintiff sufficiently alleged the performance of her obligations in paragraph thirteen of the complaint. She states there that defendant's failure to comply with the separation agreement "was not brought on or caused by any provocation" on her part. Moreover, we reject defendant's argument that plaintiff breached the agreement by allowing an adult male boyfriend to live with her in the house with a minor child. The agreement specifically provides that:

It shall be lawful for, and the said Harold Richard Harris and Arlene Ruth Harris shall at all times hereafter continue to live separate and apart from each other, each free from the marital control and authority of the other, to the same extent as though each were sole and unmarried; each of the said parties shall have the right to reside at such place or places and with such person or persons as he or she may desire or deem fit . . . and in general, to live as though

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the parties hereto had never been married.

As a matter of law, there is nothing in the agreement to prohibit the conduct defendant complains of, and defendant presents no other evidence of a possible breach by plaintiff sufficient to bar an order of specific performance in her favor. We also hold that the court did not err in its exclusion of evidence and refusal to submit an issue to the jury concerning plaintiff's relationship with another man after her divorce from defendant.

The court did not abuse its discretion in ordering specific performance in this case. The policy of this equitable remedy is to provide relief where the legal remedy is inadequate. *See Note, Enforcement of Contractual Separation Agreements by Specific Performance*, 16 Wake F. L. Rev. 117, 129-30 (1980). In *Moore v. Moore*, the Supreme Court explained the inadequacy of the legal remedy for a breach of a separation agreement.

The plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident. The nature of the contract, *i.e.*, providing for the plaintiff's basic subsistence, is such that the remedy available at law involves unusual and extreme hardship.

297 N.C. at 17, 252 S.E. 2d at 738. Here, the judge specifically found the following:

That the defendant has made no alimony payment since June 1977, and has given no indication that he intends to voluntarily make payments in the future, that the future enforcement of the contract will, in all probability, be effected only by repeated and multiple actions at law, that the plaintiff has no adequate remedy at law, and that this is a proper case for a decree ordering specific performance.

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Defendant did not except to this finding as required by Rule 10(b)(1) of the Rules of Appellate Procedure. This finding supports the judgment and order for specific performance. Moreover, it directly corresponds with the Court's conclusion in *Moore* that this type of enforcement was proper because "[t]he defendant has made no payments since 15 July 1975. There is nothing in the record which would indicate that he intends to make payments due in the future." 297 N.C. at 18, 252 S.E. 2d at 739. Defendant's other assignments of error relating to the order of specific performance are without merit and are overruled.

[5] The court excluded evidence and refused to submit an issue to the jury, pursuant to defendant's request, as to whether plaintiff had given full and fair consideration to the defendant to support his promise to pay her alimony. The court's action was entirely proper. Plaintiff covenanted to waive and relinquish all her rights, arising out of the marriage, to share in the property or estate of defendant, and she released all claims for support, maintenance and alimony except as specifically provided for in the agreement. See *2 Lee, N.C. Family Law* § 187, at 463-64 (4th ed. 1980). Plaintiff undoubtedly furnished adequate legal consideration, through her forbearance of substantial legal rights, for defendant's promise to pay alimony in a sum equivalent to fifty percent of his retirement pay each month. See *Note, Enforcement of Contractual Separation Agreements by Specific Performance*, 16 Wake F. L. Rev. 117, 129 (1980). In addition, the separation agreement in this case is a sealed instrument. "A contract executed under seal imports consideration." *Oil Corp. v. Wolfe*, 297 N.C. 36, 39, 252 S.E. 2d 809, 811 (1979)[citing *Honey Properties, Inc. v. Gastonia*, 252 N.C. 567, 114 S.E. 2d 344 (1960)]; *Savings & Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 513, 261 S.E. 2d 259, 260 (1980).

[6] The separation agreement in issue was prepared by Elizabeth Fox, an attorney in Fayetteville, North Carolina. On *voir dire* examination, Mrs. Fox testified as follows:

I had been called up by Mrs. Harris and told that both she and her husband wanted me to represent them. On a separation agreement, if the parties, if there is no controversy, I talk to them and explain everything to both parties. I guess I was representing them both at the time.

The court then ruled that she could testify as a witness for plaintiff about what the parties said while they were both in her presence.

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Specifically, her testimony showed that defendant had knowingly declined to get his own attorney, as he had been advised to do, because he knew Mrs. Fox and preferred her to handle it so no one else would be involved. The attorney testified that defendant did not appear to be in pain or have anything wrong with him, and his speech and pronunciation of words were normal on the two occasions he came to her office in September 1974. In their discussion of what the terms of the agreement should be, defendant told the attorney that "he felt that Arlene had earned half of [his] retirement pay." Finally, Mrs. Fox testified that she read the complete agreement to both parties, paragraph by paragraph, and explained every term therein before they signed it.

Defendant believes that the court's failure to exclude the attorney's testimony, *supra*, constituted a violation of the attorney-client privilege. At the outset, we note the glaring inconsistency between defendant's position on appeal and that at trial. At trial, defendant flatly denied that Mrs. Fox was his attorney:

Where the separation agreement says, "whereas both parties hereto are represented by counsel," I was not represented by counsel. I did not consider Mrs. Fox to be my attorney. She was Arlene's attorney. I paid no fee to Mrs. Fox. Arlene paid her as I understand, or I heard, I don't know, but I'm fairly sure that she did.

Also, defendant's third defense in his answer and counterclaim was that he was not represented by counsel when he signed the agreement. Moreover, he repeatedly asserts his lack of legal representation (in the transaction) throughout his brief. The privilege only attaches to communications made during the existence of the relation of attorney and client. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947). Here, defendant's own evidence tends to negate the existence of the required attorney-client relationship and supports the admission of Mrs. Fox's testimony.

Since Mrs. Fox believed that she represented both plaintiff and defendant, however, we shall further examine the nature of her testimony to determine whether it did, in fact, improperly infringe upon defendant's right to privileged communications with his attorney. At a minimum, it was clearly proper for the attorney to testify about her observation of defendant's physical condition. In *United States v.*

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Kendrick, a case originating in North Carolina, the Fourth Circuit explained the inapplicability of the privilege to testimony of this nature.

Communications made in confidence by a client to his attorney are protected by the attorney-client privilege. It is the substance of the communications which is protected, however, not the fact that there have been communications. Excluded from the privilege, also, are physical characteristics of the client, such as his complexion, his demeanor, his bearing, his sobriety and his dress. Such things are observable to anyone who talked with the client, and there is nothing, in the usual case, to suggest that the client intends his attorney's observations of such matters to be confidential. In short, the privilege protects only the client's confidences, not things which, at the time, are not intended to be held in the breast of the lawyer, even though the attorney-client relation provided the occasion for the lawyer's observation of them.

331 F. 2d 110, 113-14 (4th Cir. 1964); *Accord*, *State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978).

Another requisite of the attorney-client privilege is that the communication must have been made in confidence. 1 Stansbury, N.C. Evidence § 62 (Brandis rev. 1973). Communications made to any attorney in the presence of a third person, who is not the agent of either party, are not confidential and are, therefore, outside the scope of the privilege. *State v. Van Landingham*, 283 N.C. at 602, 197 S.E. 2d at 547. Here, the attorney's testimony was limited to matters discussed with defendant while plaintiff was present. Plaintiff was not the agent of either defendant or the attorney. Moreover, the general rule is that "where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." *Dobias v. White*, 240 N.C. 680, 685, 83 S.E. 2d 785, 788 (1954). We, therefore, hold that the testimony of attorney Fox was properly admitted. *Brown v. Green*, 3 N.C. App. 506, 165 S.E. 2d 534 (1969) (attorney could testify as to his preparation of a deed of trust for plaintiff and defendant's intestate where the evidence showed he was acting as the attorney of both parties).

[7] Plaintiff was privately examined by a proper certifying officer

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after she signed the separation agreement in accordance with the requirements of G.S. 52-6 (repealed 1977). Defendant contends that he was denied his constitutional right to equal protection because he did not also receive a privy examination before the agreement was enforceable against him. An identical argument was made in *Spencer v. Spencer*, 37 N.C. App. 481, 246 S.E. 2d 805, *appeal dismissed*, 296 N.C. 106 (1978), *cert. denied*, 441 U.S. 958, 99 S. Ct. 2400 (1979). In *Spencer*, Judge Morris (now Chief Judge) analyzed the history and purpose of G.S. 52-6 and concluded that:

[w]hen first enacted, G.S. 52-6 (or, rather, its forerunner) conferred a right - the right to enter into a separation agreement The question is whether the requirement that women have a privy exam prior to entering a separation agreement is a permissible restriction. While in 1915 it was a permissible restriction, the privy exam itself is now and always has been a restriction on the exercise of a right - *not a right* in itself. This Court has previously held that freedom of contract is a valuable right. See *North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E. 2d 357 (1973). We do not believe that infringing upon the freedom of contract enjoyed by married males would be the proper means to remedy the alleged invidious discrimination of G.S. 52-6. The proper remedy, indeed, the *only* remedy, would be to strike the privy exam requirement from G.S. 52-6.

37 N.C. App. at 488, 246 S.E. 2d at 810 (citations omitted). The Court proceeded to reject defendant's challenge to G.S. 52-6 because he did not have standing to raise the constitutional issue. The Court stated that he could not demonstrate a personal and concrete stake in the outcome when the only proper remedy upon a finding of unconstitutionality would be to strike the privy exam requirement entirely. In *Spencer*, the Court, therefore, believed that even if it were to hold G.S. 52-6 to be unconstitutional, such a holding would not benefit or affect defendant in any way since he still would not have been entitled to a privy exam. 37 N.C. App. at 488-89, 246 S.E. 2d at 811; 57 N.C. L. Rev. 960, 961 (1979). For the reasons given in *Spencer*, we hold that defendant cannot successfully attack G.S. 52-6 here because he lacks the requisite standing to litigate its constitutionality.

In addition, we also conclude as the Court did in *Spencer, supra*,

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that defendant was not unfairly prejudiced by the fact that his wife had a privy exam because he cannot show a specific, identifiable injury resulting therefrom. The separation agreement, on its face, appears to be a fair and equitable settlement of the marital and property rights of a couple married for twenty-four years. Moreover, defendant is a retired Lieutenant Colonel in the United States Army, and it is not unreasonable to assume that he generally possessed sufficient intelligence and knowledge to be able to understand the legal significance of the covenants he made in the separation agreement. It is true that he testified at trial that he lacked mental capacity to comprehend what he was doing at that time because he was under strong medication for serious health problems in the nature of a spastic stomach and colon. A next door neighbor corroborated his testimony. Nevertheless, the jury, as it was free to do, did not believe defendant and decided that he had sufficient mental capacity to enter into the separation agreement on 27 September 1974. Thus, even if the statute should be made applicable to both sexes, it would be an extremely speculative conclusion on our part, in light of the jury verdict already rendered, that defendant would have rejected the agreement if he had been privately examined about it. *See Spencer*, 37 N.C. App. at 489-90, 246 S.E. 2d at 811. For the reasons discussed, we reject defendant's assignments of error relating to the constitutionality of repealed G.S. 52-6.

[8,9] On oral argument, defendant contended that the court erred in ordering him to perform the alimony provisions of the agreement because the amount of alimony, one-half of his retirement pay for life, was clearly too excessive. We disagree. We cannot say, as a matter of law, that the parties' agreement to his amount was manifestly unreasonable or unfair to defendant. After twenty-four years of an Army marriage, the most substantial property this couple owned consisted of their vested rights to defendant's military retirement income. It was entirely proper for them to decide between themselves to divide this equally when they separated. Also, we do not know of all the circumstances leading up to the separation or how badly and quickly defendant wished to get out of the marriage. Moreover, we note that plaintiff correctly argues that the jury should have been given an appropriate instruction concerning defendant's estoppel to deny or repudiate the contract. Even if the jury had believed that defendant lacked the mental capacity to enter the contract on 27 September 1974, it still would have had to answer the further question of whether defendant had subsequently ratified and affirmed the contract by

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accepting its benefits. *Walker v. McLaurin*, 227 N.C. 53, 40 S.E. 2d 455 (1946). There was overwhelming evidence to take that issue to the jury. Defendant performed his obligations in the agreement by conveying the house to plaintiff in February 1975 and making regular monthly payments of alimony, in the agreed amounts, for twenty-five months. In October 1976 (after the divorce), however, defendant began a consistent pattern of reducing the amount of the alimony payments until he eventually stopped making them altogether in May 1977. Defendant tried to avoid his duty to pay as he had agreed to do even though he had accepted the benefits of the contract. Those benefits included the complete and final settlement of all marital rights and property with his wife, which enabled him to get a divorce and remarry without further complication. The divorce, of course, terminated all of plaintiff's rights arising from the marriage except those specifically provided for in the deed of separation. Since defendant paid alimony for thirty-two months, it was reasonable for plaintiff to rely on his continued performance, and defendant should have been estopped from denying the validity of the contract.

Defendant's remaining assignments of error have no merit and are overruled.

No error.

Judges WELLS and HILL concur.

ANNE C. VANDIVER v. MARVIN L. VANDIVER

No. 8021DC496

(Filed 20 January 1981)

1. Appeal and Error § 30.3— motions to strike granted — failure to instruct jury to disregard answers

Where defense counsel's objections and motions to strike were properly sustained in the presence of the jury and the jury could only have interpreted these rulings of the court as meaning that the witness's answer was not to be regarded as evidence in the case, defendant could not complain of the trial court's failure to instruct the jury to disregard the answer.

2. Divorce and Alimony § 11; Husband and Wife § 6— divorce from bed and board — wife's testimony of husband's adultery — admissibility

In plaintiff's action for divorce from bed and board, the trial court did not err in allowing plaintiff to testify that defendant began seeing another woman in 1975,

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that he telephoned this woman from the parties' home, and that from September 1975 until 24 September 1976, the date on which defendant abandoned the parties' home, defendant was gone from the parties' home every weekend and holiday, and there was no merit to defendant's contention that plaintiff's testimony concerning his activities with the other woman was inadmissible because in N. C. neither spouse is a competent witness to prove the adultery of the other, since plaintiff did not allege defendant's adultery; the issue of adultery was not submitted to the jury; and plaintiff's testimony concerning defendant's activities with the woman was admissible for the purpose of proving the alleged indignities suffered by plaintiff at defendant's hands.

3. Appeal and Error § 48.1; Divorce and Alimony § 11—divorce from bed and board — indignities committed by defendant — admissibility of evidence

In plaintiff's action for divorce from bed and board, the trial court did not err in admitting into evidence testimony concerning defendant's use of pornographic material in the presence of the parties' minor children, defendant's refusal to provide educational support for one of the parties' adult children, and defendant's sexual advances upon the parties' daughter, since such evidence was relevant to show the circumstances surrounding plaintiff's claim that defendant's acts constituted such indignities to plaintiff's person that her condition was rendered intolerable and her life burdensome; though defendant had no legal obligation to furnish financial assistance to the parties' adult daughter, in light of evidence that plaintiff was furnishing such support while defendant had refused to furnish such aid or assistance, such testimony was relevant to show the burdensome conditions of plaintiff's life occasioned by defendant's conduct; and although defendant objected to plaintiff's testimony concerning defendant's use of pornographic material and his sexual advances upon the daughter, the parties' son and daughter testified without objection in more detail concerning these actions by defendant, and defendant therefore waived the benefit of his earlier objection made with respect to the evidence.

4. Divorce and Alimony § 11— divorce from bed and board — indignities rendering life burdensome — sufficiency of evidence

In plaintiff's action for divorce from bed and board on the ground that defendant had inflicted such indignities upon her as to render her life burdensome, evidence was sufficient to enable the jury to find for plaintiff where it tended to show that at some time prior to 1969 defendant began sleeping and spending the majority of his time in the basement of the parties' home, isolated from plaintiff; upon moving into the basement, defendant withdrew from active participation in the resolution of familial and household problems; defendant viewed hardcore pornographic material in his basement and permitted his minor children to view such material; during 1973 and 1974 defendant requested that plaintiff indulge him in various unnatural sexual desires; and subsequent to 1975 defendant was absent from the parties' home every weekend and all holidays until 24 September 1976 when he left the home for good.

5. Divorce and Alimony § 11— issues submitted to jury — waiver of complaint

In plaintiff's action for divorce from bed and board on the ground that defendant had rendered such indignities as to make her life burdensome, defendant could not complain on appeal that the issue of plaintiff's indignities offered to defendant

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should have been submitted to the jury, since defendant never demanded submission of the issue at trial.

6. Divorce and Alimony § 11— jury instructions — lapsus linguae — no prejudice

In plaintiff's action for divorce from bed and board, the trial court, in stating the abandonment issue and the indignities issue, erred by referring to the unwarranted conduct or the adequate provocation of defendant rather than plaintiff, but these errors did not mislead the jury, were clearly *lapsus linguae* and were therefore not prejudicial to defendant.

7. Divorce and Alimony § 11; Trial § 42— divorce from bed and board — verdict — no irregularity

In plaintiff's action for divorce from bed and board, trial court did not err in refusing to set aside the jury's verdict on the ground that it was irregular on its face where two issues were submitted to the jury, whether defendant abandoned plaintiff and whether defendant offered indignities to plaintiff so as to render her life burdensome; after some deliberation the jury returned to the courtroom to inquire of the judge whether they had to reach verdicts on both issues, to which the judge replied negatively; the jury subsequently returned a verdict answering only the issue as to indignities; and an affirmative answer to either of the issues submitted would have entitled plaintiff to judgment, and the other issue submitted but not answered could therefore be treated as mere surplusage.

8. Divorce and Alimony § 16.8— supporting and dependent spouses — no jury question

Defendant was not entitled to a jury trial on the issue of supporting and dependent spouse status since issues of who is a dependent spouse and who is a supporting spouse are mixed questions of law and fact which can best be determined by the trial judge when he sets the amount of permanent alimony.

9. Divorce and Alimony § 16.6— supporting and dependent spouses — sufficiency of evidence

Evidence was sufficient to support trial court's conclusion that plaintiff was the dependent spouse and defendant the supporting spouse where it tended to show that plaintiff's income was approximately \$189 per month while her house payment was \$113.75 and other reasonable monthly expenses were \$432; and although defendant was not employed at the time of the hearing, his monthly income totalled \$998 while his monthly expenses were approximately \$863, but those expenses were expected to be reduced to \$597 within a few months after the hearing.

10. Divorce and Alimony § 16.6— award of alimony to plaintiff proper

The trial court did not err in ordering an award of alimony to plaintiff, since the dependent spouse is entitled to an order of alimony when the supporting spouse offers such indignities to the dependent spouse's person as to render her condition intolerable and life burdensome; the trial court properly found plaintiff to be a dependent spouse and defendant a supporting spouse; and the jury properly determined that defendant offered the requisite indignities to plaintiff without provocation.

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11. Divorce and Alimony § 16.5— plaintiff's acts of misconduct — evidence properly excluded at alimony hearing

The trial court did not err in refusing to allow defendant, at the hearing on the amount of alimony, to put on evidence of plaintiff's acts of misconduct in order to reduce or deny the alimony, since the issue of fault was a factual question which had been resolved by the jury's verdict that defendant offered the requisite indignities to plaintiff without provocation.

12. Divorce and Alimony § 16.9— attorney's fees — award proper

There was no merit to defendant's contention that, because plaintiff's claim for alimony pendente lite was denied, plaintiff was precluded from recovering attorney's fees in the subsequent action for permanent alimony. G.S. 50-16.4.

APPEAL by defendant from *Alexander (Abner)*, Judge. Judgment entered 27 December 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 13 November 1980.

Plaintiff initiated this action on 10 November 1976 by filing a verified complaint seeking, *inter alia*, a divorce from bed and board, temporary and permanent alimony and reasonable attorney's fees. Plaintiff alleged that defendant had abandoned plaintiff without provocation and that defendant had offered indignities to the person of plaintiff. In his answer defendant denied plaintiff's allegations and alleged that plaintiff had constructively abandoned defendant and had offered indignities to defendant's person. Defendant also counter-claimed for an absolute divorce. Plaintiff's claims for alimony pendente lite and counsel fees were denied at a hearing on 30 December 1976.

The case was tried before a jury. Plaintiff presented evidence concerning defendant's domestic activities and that defendant abandoned the parties' home on 24 September 1976. Plaintiff's evidence will be discussed in more detail in the body of the opinion. Defendant's motion for a directed verdict at the close of plaintiff's evidence was denied. Defendant presented no evidence. The jury found that defendant, without provocation, had offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. Following the denials of defendant's motions for judgment n.o.v. and to set aside the verdict and for a new trial, the trial judge heard testimony to determine the issues of dependent and supporting spouse, and the amount of alimony. At the conclusion of this hearing, the trial judge made detailed findings of fact and concluded that plaintiff was a dependent spouse, defendant was a supporting spouse, and that plaintiff was entitled to an order for permanent alimony, for

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reasonable attorney's fees, and for a divorce from bed and board from defendant. This judgment awarded plaintiff \$250.00 each month as permanent alimony and \$2,500.00 as reasonable attorney's fees. Defendant appeals.

Pfefferkorn & Cooley, P.A., by Robert M. Elliott, for plaintiff appellee.

Max D. Ballinger for defendant appellant.

WELLS, Judge.

[1] Defendant's first assignment of error concerns several instances during the defendant's examination of plaintiff when the trial judge sustained both defendant's objections to and motions to strike certain questions and answers but failed to instruct the jury to disregard the answers. Although the better procedure, upon allowing a motion to strike, is for the court to give the instruction to disregard the answer immediately after allowing the motion, *see State v. Franks*, 300 N.C. 1, 13, 265 S.E. 2d 177, 184 (1980); *State v. Greene*, 285 N.C. 482, 495, 206 S.E. 2d 229, 237 (1974), we find no prejudicial error in this case. Defense counsel's objections and motions to strike were promptly sustained in the presence of the jury and the jury could only have interpreted these rulings of the court as meaning that the witness' answer was not to be regarded as evidence in the case. *Moore v. Insurance Co.*, 266 N.C. 440, 450, 146 S.E. 2d 492, 500 (1966).

[2] Defendant assigns error to the trial court's decision to allow plaintiff to testify that defendant began seeing another woman in 1975, that defendant telephoned this woman, Virginia Holder, from the parties' home, and that from September 1975 until 24 September 1976, defendant was gone from the parties' home every weekend and holiday. Sylvia Vandiver, the parties' daughter, testified without objection that after 24 September 1976, she visited her father several times at Virginia Holder's house where he was living. Defendant contends that plaintiff's testimony concerning defendant's activities with Virginia Holder was inadmissible because in North Carolina, according to *Hicks v. Hicks*, 275 N.C. 370, 167 S.E. 2d 761 (1969), neither spouse is a competent witness to prove the adultery of the other. While correctly stating the rule in *Hicks*, *see* G.S. 50-10, defendant incorrectly concludes that it applies to the case *sub judice*. Defendant's adultery was not in issue in this case as it was in *Hicks*. In this case, plaintiff had not alleged defendant's adultery and the issue of

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issue of adultery was not submitted to the jury. When there has been no accusation or attempt by plaintiff to prove adultery, and when plaintiff's testimony provides no clear implication of defendant's sexual intercourse amounting to adultery, the *Hicks* rationale is inapposite. *Traywick v. Traywick*, 28 N.C. App. 291, 293-94, 221 S.E. 2d 85, 87 (1976); *Earles v. Earles*, 26 N.C. App. 559, 563-64, 216 S.E. 2d 739, 742-43, *disc. rev. denied*, 288 N.C. 239, 217 S.E. 2d 679 (1975). Plaintiff's testimony concerning defendant's activities with Virginia Holder was admissible for purposes of proving the alleged indignities suffered by plaintiff at defendant's hands. *Watts v. Watts*, 44 N.C. App. 46, 48, 260 S.E. 2d 170, 171 (1979); *see also Horner v. Horner*, 47 N.C. App. 334, 267 S.E. 2d 65 (1980). Defendant's assignments of error with regard to this testimony are overruled.

[3] Defendant next assigns error to the admission into evidence of testimony concerning: (1) defendant's use of pornographic material in the presence of the parties' minor children; (b) defendant's refusal to provide educational support for one of the parties' adult children; and, (c) defendant's sexual advances upon the parties' daughter. Initially, we hold that the aforementioned evidence is relevant to show the facts and circumstances surrounding plaintiff's claim that defendant's acts constituted such indignities to plaintiff's person that plaintiff's condition was rendered intolerable and life burdensome. *See Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E. 2d 597, 599 (1947); *Chambless v. Chambless*, 34 N.C. App. 720, 722-23, 239 S.E. 2d 624, 625 (1977); 1 Lee, N.C. Family Law § 82, at 382-90 (1979). We also note that although defendant objected to plaintiff's testimony concerning defendant's use of pornographic material and defendant's sexual advances upon the daughter, the parties' son and daughter testified in more detail concerning these actions by defendant, without objection. When a party fails to object to the admission of evidence, the benefit of any earlier objection made with respect to that evidence is waived. *Watts v. Watts*, *supra*, at 48, 260 S.E. 2d at 171. While we recognize that defendant had no legal obligation to furnish financial assistance to the parties' adult daughter, in the light of evidence that plaintiff was furnishing such support while defendant had refused to furnish such aid or assistance, we consider such testimony relevant in this case as to the burdensome conditions of plaintiff's life occasioned by defendant's conduct. These assignments of error are overruled.

[4] Defendant next assigns as error the trial court's denial of defendant's motions for a directed verdict and for judgment n.o.v. We find

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each of these assignments of error to be without merit.

A motion for a directed verdict and a motion for judgment n.o.v. present the question of whether the evidence was sufficient to enable the jury to find for plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902-3 (1974). In making this determination the evidence must be considered in the light most favorable to the non-movant. *Id.* A dependent spouse is entitled to an order for alimony when the supporting spouse "offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome." G.S. 50-16.2(7); *Fogleman v. Fogleman*, 41 N.C. App. 597, 599, 255 S.E. 2d 269, 270 (1979); 2 Lee, N.C. Family Law § 137, at 165 (1980). Plaintiff's evidence indicated that at some time prior to 1969, defendant began sleeping and spending the majority of his time in the basement of the parties' home, isolated from plaintiff. Upon moving into the basement, defendant withdrew from active participation in the resolution of familial and household problems. Defendant viewed "hardcore" pornographic material in his basement and permitted his minor children to view such material. During 1973 and 1974, defendant requested that plaintiff indulge him in various unnatural sexual desires. Subsequent to 1975, defendant was absent from the parties' home every weekend and all holidays until 24 September 1976 when defendant left the home for good. Taken in the light most favorable to plaintiff, there is evidence that defendant denied plaintiff any reasonable companionship and affection. See *Briggs v. Briggs*, 21 N.C. App. 674, 676, 205 S.E. 2d 547, 549 (1974). Recognizing that the "acts of a husband which will constitute such indignities to the person of his wife, as to render her condition intolerable and life burdensome, largely depend upon the facts and circumstances in each particular case," *Barwick v. Barwick*, *supra*, at 112, 44 S.E. 2d at 599, we hold the evidence was sufficient to enable the jury to find that plaintiff had suffered such indignities at the hands of defendant.

[5] Defendant's next assignments of error involve the issues submitted to the jury. Defendant contends that his counsel was not sufficiently put on notice of which of the proposed issues would actually be submitted to the jury, and that the issue of plaintiff's indignities offered to defendant should have been submitted to the jury. G.S. 1A-1, Rule 49(c) of the Rules of Civil Procedure, provides as follows:

If, in submitting the issues to the jury, the judge omits any

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issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

Although there was some evidence to the effect that plaintiff offered indignities to defendant, and although defendant's pleadings did raise such issue, the record does not indicate that defendant ever demanded submission of the issue. Defendant could have demanded the issue's submission at any time before the jury retired. The inadvertent omission of an issue of fact should not jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 225-26, 217 S.E. 2d 566, 575 (1975). These assignments of error are overruled.

Defendant also assigns error to the failure of the trial judge to submit the issue of defendant's entitlement to an absolute divorce to the jury. Defendant's failure to demand the submission of this issue to the jury before the jury retired, requires that we also find this assignment of error to be without merit.

Defendant also assigns error to four aspects of the trial court's charge to the jury. The trial judge, in his summary of the evidence, stated that the defendant moved down to the basement "around 1963 or '64". While there was testimony that defendant moved to the basement at that time, other evidence indicated that defendant had not moved to the basement until some years after 1964. Defendant contends that this incomplete summarization of the evidence was prejudicial even in light of the trial court's admonition to the jury at the end of his summary of the facts that his summary did not cover all the evidence. The record divulges, however, that defendant never objected at trial to this aspect of the jury charge. By failing to call this alleged misstatement of the evidence to the attention of the court at any time during the trial, defendant has waived any right to have it considered on appeal. *Penland v. Green*, 289 N.C. 281, 285, 221 S.E. 2d 365, 369 (1976); *Womble v. Morton*, 2 N.C. App. 84, 88, 162 S.E. 2d 657, 660 (1968).

Defendant also objects to the trial judge's summation of the evidence of defendant's use of pornography, defendant's activities

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with Virginia Holder and defendant's indecent liberties taken with his daughter, on grounds of irrelevancy to the issue of indignities suffered by plaintiff. We have already held this evidence to be relevant to show the facts and circumstances surrounding plaintiff's claim, and we therefore overrule this assignment of error.

[6] Defendant's final two assignments of error regarding the charge to the jury concern the following two excerpts from the charge, stating the abandonment issue and the indignities issues respectively:

[T]he plaintiff must also show that this abandonment was without adequate provocation; that is, that it was not the result of the unwarranted conduct of the (defendant.)

(This means that the plaintiff, Anne C. Vandiver, must prove by the greater weight of the evidence, that the defendant subjected the plaintiff to such indignities as to render her condition intolerable and life burdensome and that these indignities were without adequate provocation by the (defendant.))

The court erred by referring to the "unwarranted conduct" or the "adequate provocation" of defendant rather than plaintiff in these two excerpts. The trial judge did, however, properly instruct the jury in several other portions of the charge and taken as a whole we hold that these errors did not mislead the jury but were clearly *lapsus linguae* and were therefore not prejudicial to defendant. See *Van Poole v. Messer*, 25 N.C. App. 203, 206-7, 212 S.E. 2d 548, 550 (1975).

[7] Defendant next assigns error to the trial court's refusal to set aside the jury's verdict on grounds that the verdict was irregular on its face. Two issues were submitted to the jury:

1. Did the defendant, Marvin L. Vandiver, willfully abandon the plaintiff, Anne C. Vandiver, without just cause or provocation?

....

2. Did the defendant, Marvin L. Vandiver, without provocation, offer such indignities to the person of the plaintiff, Anne C. Vandiver, as to render her condition intolerable and life burdensome?

After some deliberation the jury returned to the courtroom to inquire of the judge whether they had to reach verdicts on both issues. The

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trial judge instructed the jury that if it reached an affirmative answer as to one of the issues, then it would be unnecessary to answer the other issue. The jury subsequently returned a verdict as follows: "issue number 1, no answer; issue number 2, yes." An affirmative answer to either of the issues submitted would have entitled plaintiff to judgment, and therefore the other issue submitted but not answered may be treated as mere surplusage. 2 McIntosh, N.C. Practice 2d, § 1577, at 84 (1956). See also *Campbell v. R.R.*, 201 N.C. 102, 109, 159 S.E. 327, 331 (1931). We perceive no irregularity in this verdict and therefore overrule this assignment of error.

[8] Defendant also makes several assignments of error based upon the trial court's conclusion of law that plaintiff was a dependent spouse and that defendant was a supporting spouse. Defendant first contends that he was entitled to a jury trial on the issues of supporting and dependent spouse status. This question has previously been answered by this Court. The issues of who is a dependent spouse and who is a supporting spouse are "mixed questions of law and fact which can be best determined by the trial judge when he sets the amount of permanent alimony." *Earles v. Earles, supra.*, at 562-63, 216 S.E. 2d at 742; see also *Fogleman v. Fogleman, supra.*, at 599, 255 S.E. 2d at 270; *Bennett v. Bennett*, 24 N.C. App. 680, 681-82, 211 S.E. 2d 835, 836-37 (1975); 2 Lee, N.C. Family Law § 137, at 167-68 (1980). It was proper for the trial court not to submit the issues of supporting and dependant spouse status to the jury.

[9] Defendant's second contention challenges the sufficiency of the evidence to support the trial judge's findings of fact and conclusions of law that plaintiff was a dependent spouse and defendant was a supporting spouse.¹ The trial judge found the following facts which were

¹ § 50-16.1 Definitions.—As used in the statutes relating to alimony and alipendente lite unless the context otherwise requires, the term:

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- (3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.
 - (4) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife.

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specifically testified to by plaintiff at the hearing: (1) in the first eleven months of 1979, plaintiff's total income was \$2,264.79—\$2,132.79 from several government grants and programs, and \$132.00 in dividends from stock owned jointly by the parties; (2) since defendant's departure in 1976, plaintiff has made the monthly house payments of \$113.75 without contribution from defendant; (3) in addition to the house payments, plaintiff incurs reasonable monthly expenses in the amount of \$432.15; (4) although defendant was not employed at the time of the hearing, his monthly income, in the form of a pension from his former employer and social security benefits, totalled \$998.00; and (5) defendant's monthly expenses will decrease to \$597.00 several months after the time of hearing. Based on these facts, the trial judge concluded that:

17. The plaintiff is actually substantially in need of maintenance and support from the defendant, since on the basis of her income of this year, she is not only able to provide approximately One Hundred Eighty-Nine Dollars (\$189.00) of the Four Hundred Thirty-two Dollars and Fifteen Cents (\$432.15) which she presently incurs in monthly expenses. Therefore, the plaintiff does not have sufficient resources whereon to subsist hereafter.

....

19. The defendant, as the husband of the plaintiff, is the person upon whom she is actually substantially dependent to maintain the station in life to which she has been accustomed. Further, the defendant is financially capable of contributing to the plaintiff's support, given his tax-free income of approximately Nine Hundred Ninety-eight Dollars (\$998.00) per month and his present monthly expenses of approximately Eight Hundred Sixty-three Dollars (\$863.00), which will be reduced to approximately Five Hundred Ninety-seven Dollars (\$597.00) in the next several months when he has satisfied his obligations concerning the payments on his truck and on his wood stove.

20. Based on the estate and earnings of the parties herein, a fair, reasonable and necessary amount for the defendant to pay towards the support and maintenance of the plaintiff is Two Hundred Fifty Dollars (\$250.00) per month and the defendant is financially capable of paying said amount.

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We hold that these findings of fact properly support the trial court's conclusions of law that plaintiff was the dependent spouse and defendant the supporting spouse. See *Williams v. Williams*, 299 N.C. 174, 179-87, 261 S.E.2d 849, 854-58 (1980). Because of this holding, it is unnecessary that we consider defendant's assignment of error concerning the constitutionality of the provisions of G.S. 50-16.1(4) that the husband is deemed to be the supporting spouse unless he is incapable of supporting his wife. See *Galloway v. Galloway*, 40 N.C. App. 366, 369, 253 S.E. 2d 41, 43-44 (1979). All of defendant's assignments of error regarding the trial court's determination of dependent and supporting spouse status are overruled.

[10] Defendant next assigns as error the trial court's order awarding alimony to plaintiff. This assignment of error is clearly without merit. A dependent spouse is entitled to an order for alimony when the supporting spouse offers such indignities to the dependent spouse's person as to render her condition intolerable and life burdensome. G.S. 50-16.2(7); 2 Lee, N.C. Family Law § 137, at 165 (1980). As we discussed above, the trial court properly found plaintiff to be a dependent spouse and defendant a supporting spouse, and the jury properly determined that defendant offered the requisite indignities to plaintiff without provocation. An award of alimony to plaintiff was clearly authorized in these circumstances. Defendant also challenges the award, however, on the grounds that the \$250.00 per month award was \$6.85 more than the amount that plaintiff testified she needed for monthly expenses. The trial judge's determination of the amount of alimony will not be disturbed absent a clear abuse of discretion. *Eudy v. Eudy*, 288 N.C. 71, 79-80, 215 S.E. 2d 782, 788 (1975). The findings of fact in this judgment indicate that the trial court properly considered those factors that by statute are relevant to the determination of the amount of alimony. G.S. 50-16.5(a); *Watts v. Watts, supra*, at 48-49, 260 S.E. 2d at 172. No abuse of discretion has been shown.

[11] In a related assignment of error, defendant contends that the trial court erred in refusing to allow defendant, at the hearing on the amount of alimony, to put on evidence of plaintiff's acts of misconduct in order to reduce or deny the alimony pursuant to G.S. 50-16.5(b). Although fault may be a consideration in determining the amount of alimony, *Williams v. Williams, supra*, at 187-88, 261 S.E. 2d at 858-59, the issue of fault in the case *sub judice* was a factual question resolved by the jury's verdict that defendant offered the requisite indignities to plaintiff without provocation. See *Self v. Self*, 37 N.C. App. 199, 200-1,

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245 S.E. 2d 541, 542-43, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 253 (1978). The trial court did not err in refusing to allow defendant to resurrect the issue of fault at the alimony hearing. This assignment of error is overruled.

[12] Defendant also assigns error to the trial court's order awarding plaintiff reasonable attorney's fees. G.S. 50-16.4 provides:

At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

Defendant contends that because plaintiff's claim for alimony pendente lite was denied, plaintiff is precluded from recovering attorney's fees in the subsequent action for permanent alimony. We disagree. In *Upchurch v. Upchurch*, this Court said:

We construe the statute [G.S. 50-16.4] to say that *at any time* a dependent spouse can show that she has the grounds for alimony pendente lite—(1) that she is entitled to the relief demanded in her action or cross-action for divorce from bed and board or alimony without divorce, and (2) that she does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof—the court is authorized to award fees to her counsel, and that “at any time” includes times subsequent to the determination of the issues in her favor at the trial of her cause of its merits.

34 N.C. App. 658, 664-65, 239 S.E. 2d 701, 705 (1977), *disc. rev. denied*, 294 N.C. 363, 242 S.E. 2d 634 (1978). The trial court made findings of fact showing that the fees were allowable and that the amount awarded was reasonable. See *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972); *McLeod v. McLeod*, 43 N.C. App. 66, 68, 258 S.E. 2d 75, 76-77, *disc. rev. denied*, 298 N.C. 807, 261 S.E. 2d 920 (1979). This assignment of error is overruled.

Defendant also assigns error to the trial court's order awarding plaintiff a divorce from bed and board. The jury verdict entitled plaintiff to the trial court's judgment awarding plaintiff divorce from bed and board. This assignment is without merit and is overruled.

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No error.

Judges VAUGHN and MARTIN (Robert) concur.

IN RE: BIGGERS, TWO MINOR CHILDREN

No. 8019DC447

(Filed 20 January 1981)

1. Parent and Child § 1— termination of parental rights — failure to provide reasonable support of foster child — constitutionality of statute

The statute permitting the termination of parental rights for failure of the parent to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition, G.S. 7A-289.32(4), does not violate the equal protection clause by discriminating among persons similarly situated since it applies to all parents equally and allows due consideration of their specific individual financial circumstances.

2. Parent and Child § 1— termination of parental rights — constitutionality of statutes

Statutes permitting the termination of parental rights if a child is neglected as defined by statute, G.S. 7A-289.32(2), or if the parents fail to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition for termination of parental rights, G.S. 7A-289.32(4), are not unconstitutionally vague but are sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit.

3. Parent and Child § 1— termination of parental rights — sufficiency of evidence

The trial court properly terminated respondent mother's parental rights in her two children where the evidence supported findings by the court that the children were neglected children within the meaning of G.S. 7A-278(4) and that respondent failed to pay any portion of their foster care costs for more than six months preceding the filing of the petition.

APPEAL by respondent from *Warren, Judge*. Judgment entered 7 December 1979 in District Court, CABARRUS County. Heard in the Court of Appeals 5 November 1980.

The District Court entered an order pursuant to G.S. 7A-289.32 terminating respondent's parental rights to her two minor children.

The petitioner, the Cabarrus County Department of Social Services, presented the following evidence. On 4 August 1972, Carolyn

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Eury, a social work supervisor at the Department, received a letter from the county health department regarding David Biggers, born 13 July 1972. On 22 September 1972, respondent, Mrs. Penny Overcash Biggers, called the Department to inquire about care for her son David. She stated that her husband, Kenneth Biggers, had been abusing the child and that she needed to go to Dorothea Dix Hospital.

Barry Thornburg, another social worker, was assigned to the case by the Department. He observed that the Biggers were having marital difficulties and that Mrs. Biggers had emotional problems. He concluded that Mrs. Biggers was not providing adequate care for her son. At the time, David's grandmother, Mrs. Overcash, often took care of him. A homemaker was appointed to assist Mrs. Biggers in the care of the child. The situation, however, did not improve, and, on 8 November 1972, David Biggers was adjudicated dependent by the District Court and placed in the Department's custody.

Although the Biggers cancelled several visits with David after his placement in foster care, they eventually did see him on 15 December 1972. The next visit was not until 2 May 1974, when the Department allowed David to go home for a full day. During the time of his foster care placement, David's parents had separated, but they were reunited in November 1973, the month in which another child, Wendy Denise, was born.

The Biggers' marital problems quickly resumed, however, and shortly after David's home visit, Mrs. Biggers took an overdose of drugs on 15 June 1974. At the time, Mr. Biggers had been intoxicated for several weeks. Throughout this period, the Department continued to provide supervision for the home. Nonetheless, David was returned to the custody of the Biggers on 25 April 1975.

A year later, the Department received another complaint requesting protective services for the Biggers children. An attempt was made to reduce David's developmental retardation through day care placement. In day care, he made substantial progress and seemed to enjoy himself. Nevertheless, due to David's regular absences caused by his mother's failure to get him ready for the bus each morning, the day care enrollment had to be terminated.

In December 1976, the Department and the local housing authority inspected the Biggers' apartment. The home was infested by pests

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due to unsanitary conditions, debris and garbage. A short time later, Mrs. Biggers again contacted the Department concerning child care services, but she did not complete the application. She was taken to the hospital for another drug overdose on 3 May 1977.

A social worker visited the Biggers' trailer on 19 October 1977. She found that the trailer had not been cleaned up for some time and that there was no heat. A week later, she revisited the home and found Wendy barefoot with a runny nose. On another occasion, she washed the dishes and prepared a casserole for the children's supper.

The Department subsequently filed a petition alleging dependency of the Biggers children and requesting their custody for foster care. The District Court concluded that the children were neglected and granted the Department's petition on 4 November 1977 upon its findings of fact:

That on or about the 30th day of October, 1977, between 10:00 a.m. and 11:00 a.m., Clyde Dellinger, a Deputy Sheriff of Cabarrus County, was summonsed to a trailer wherein Penny Overcash Biggers and Kenneth Brown Biggers were, and wherein Penny Overcash Biggers, mother of the above named children, lived with the children; that said children were outside in the weather, the temperature being in the low 50's; that said children were dressed light and not in keeping with the weather; that the children had infected ears and throat; that their nose and part of their face was covered with mucous and saliva; that Mrs. Biggers was intoxicated and Mr. Biggers had been drinking; that beer cans were strewn about the trailer and outside; that the refrigerator contained a small amount of food; that pots and pans with dried food were on the floor; that the stove was filthy; that there was the odor of urine present in and about the trailer; that the entire trailer was filthy; that the children had not had a cooked meal in days; that the only food the children had had was food brought in by the father from a quick food establishment; that the only food the mother had given the children was from cans; that the mother has been under psychiatric care for some seven (7) years, and is now being treated by Dr. Kneedler and taking drugs for her condition.

The court ordered Mr. Biggers to pay \$25.00 per week for child support

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while his children were in foster care.

The Biggers later signed a plan of care agreement with the Department on 22 December 1977. They understood that compliance with the agreement was a condition precedent to the return of the children to their custody. The joint requirements of the agreement were that the Biggers maintain a stable marriage, keep an efficient, clean household and meet with a social worker every two weeks. In addition, Mrs. Biggers agreed to meet with her therapist at the mental health clinic for her nervous condition and drug abuse problem until she obtained a written statement that she no longer needed such counselling. Mr. Biggers also agreed to keep a steady job, pay \$25.00 a week for the children's support and continue his therapy for alcohol abuse at the mental health clinic. These conditions were never fulfilled by the Biggers.

Shortly before and after the signing of this agreement, Mrs. Biggers was involuntarily committed to Broughton Hospital due to alcohol abuse and destructive behavior. Thereafter, she failed to keep appointments with her psychologist. On 18 February 1978, the Department's social worker supervisor went to the home of Mrs. Overcash where Mrs. Biggers was staying. Mrs. Biggers was highly intoxicated and urinated on herself. She was also very aggressive and threw a chair at her mother. During the same month, Mrs. Biggers again returned to Broughton Hospital for treatment.

The Biggers only visited with the children on two occasions, 22 December 1977 and 12 January 1978, after their placement in foster care. The next visit was not until eight months later in September. The Biggers separated again in May 1978.

Mrs. Biggers signed another plan of care agreement on 6 October 1978 to establish a basis for the return of the children to her custody. She agreed to meet with her social worker every two weeks, pay \$100.00 a month for child support, keep her job at Craftsman Fabrics and obtain a written statement from a psychologist at the mental health clinic that she no longer needed counselling to maintain a healthy home environment. The agreement provided for an evaluation within thirty-one days at which time the Department would decide upon one of the following courses of action: (1) returning custody to Mrs. Biggers; (2) seeking voluntary release of parental rights for adoption; or (3) seeking court action for the termination of parental

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rights. Four days after she signed this agreement, Mrs. Biggers was fired from her job at Craftsman Fabrics for refusing to do the work she was assigned to do and cursing her supervisor. Mrs. Biggers did not comply with any of the terms in the agreement.

The Department, therefore, decided to make arrangements for the children's adoption in November 1978. A consent form was mailed to Mrs. Biggers, and one was also sent to Mr. Biggers in California. Mrs. Biggers refused to consent to the adoption plans. The Biggers then visited the children on 19 December 1978 and gave them Christmas presents.

The Department filed this action to terminate parental rights on 9 January 1979. Several witnesses testified that when the children were placed in foster care, they were withdrawn and behind their peers in development. Both initially suffered from severe developmental retardation. Yet under foster care, both demonstrated continuous progress. The sum of the testimony for the Department was that it was in the children's best interests that they be legally cleared for adoption. Mrs. Biggers' psychologist, Tom Moon, testified that he had not seen her since March 1978 and that she did not receive benefit from counselling due to her repeated failures to keep appointments. In Moon's opinion, Mrs. Biggers was not able to cope with the day to day care of children or with her own personal problems, and she used drugs and alcohol to keep from facing them. According to Moon, the likelihood of any change was very remote.

At the end of this evidence, respondent made a motion to dismiss the petition which was denied. Respondent's only evidence was the testimony of Dr. Harding Kneedler, a local physician. He stated that he had treated Mrs. Biggers periodically for the last ten years. He stated that her drug and alcohol abuse began when she was only fifteen years old. Based upon his observations of her within the past year, however, Dr. Kneedler was of the opinion that Mrs. Biggers was no longer suffering from such abuses. He believed that Mrs. Biggers' problems were mainly due to her husband and that she would be able to take care of the children better with him out of the picture. Respondent did not testify. A guardian *ad litem* had been appointed for the minor children, but he did not present any separate evidence on their behalf.

The court granted the petition for termination of parental rights

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on 7 December 1979. The pertinent conclusions of law were:

1. That the Respondent Penny Overcash Biggers has neglected the children Wendy Denise Biggers and David Brown Biggers and said children are neglected children under G.S. 7A-278(4).

2. That the Respondent Penny Overcash Biggers has failed for a continuous period of more than six months next preceding the filing of the Petition in this proceeding to pay a reasonable portion of the costs of care for said children while they were in the custody of a county department of social services.

...

4. That it is in the best interest of said children that the parental rights of Penny Overcash Biggers be terminated.

From this judgment, respondent appeals.

Williams, Willeford, Boger, Grady and Davis, by Samuel F. Davis, Jr., and Forbis and Grossman, by Steven A. Grossman, for petitioner appellee.

Johnson, Belo and Plummer, by James C. Johnson, Jr. for respondent appellant.

VAUGHN, Judge.

Respondent urges reversal of the judgment on two bases: the unconstitutionality of G.S. 7A-289.32 and the insufficiency of the evidence to permit the termination of parental rights under the statute. We disagree with respondent's contentions on both points and affirm.

At the outset, we must consider the inconsistency appearing in conclusion of law number three in which Judge Warren stated that grounds for termination existed "under G.S. 7A-289.32, subsections (1) and (3), as amended by Chapter 669 of the 1979 Session Laws" Since the amendment repealed subsection (1) of the statute, Judge Warren must have meant to refer to the grounds given in subsections (2) and (4) instead, as evidenced by conclusions of law numbers one and two, *supra*. As only one of seven findings is necessary to order termination under G.S. 7A-289.32, however, we shall disregard conclusion of law number three as surplusage unnecessary to sustain the order. In addition, the 1979 amendment deleted the words "physically" preceding "abused or neglected" in subsection (2). Since that

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deletion did not change the meaning of "neglected," which is the relevant portion here, the applicability of the amendment to the proceeding is not raised even though the petition was filed before its effective date. We shall, therefore, proceed with our analysis of the statute as amended.

[1] G.S. 7A-289.32 provides seven grounds upon which parental rights can be terminated. Judge Warren's conclusions of law numbers one and two, *supra*, sufficiently identify two of those grounds as applicable to this case: G.S. 7A-289.32(2) and (4). Respondent contends that the statute is generally unconstitutional because it violates the equal protection clause of the fourteenth amendment of the federal constitution. In this proceeding, however, the only question for our determination is the constitutionality of G.S. 7A-289.32(2) and (4). Though respondent has failed to articulate her constitutional arguments, we have carefully considered her general objections and find them to be of no avail.

Our Supreme Court has explained the scope of constitutional equal protection.

The equal protection clauses of the United States and North Carolina Constitutions impose upon lawmaking bodies the requirements that any legislative classification "be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud*, 354 U.S. 457, 465, 1 L.Ed. 2d 1485, 1491, 77 S.Ct. 1344, 1350 (1957); *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971); *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972). Such classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *State v. Greenwood*, *supra*; *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E. 2d 364 (1964).

In *re Moore*, 289 N.C. 95, 104, 221 S.E. 2d 307, 313 (1976); *Duggins v. Board of Examiners*, 294 N.C. 120, 240 S.E. 2d 406 (1978). Here, only G.S. 7A-289.32(4) would even seem to be susceptible to an equal protection claim. It provides for the termination of parental rights upon the finding that:

The child has been placed in the custody of a county department of social services, a licensed child-placing

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agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

The basis for an equal protection claim against this subsection would be that it discriminates against parents, according to their financial circumstances, by authorizing termination of their rights for the economic failure to pay for their child's foster care costs. *See* 70 Colum. L. Rev. 465, 469 n. 28 (1970). Such a claim cannot be sustained because subsection (4) does not make any distinction between parents similarly situated.

G.S. 7A-289.32(4) requires parents to pay a *reasonable* portion of the child's foster care costs, and this requirement applies to all parents irrespective of their wealth or poverty. The parents' economic status is merely a factor used to determine their ability to pay such costs, but their ability to pay is the controlling characteristic of what is a reasonable amount for them to pay. In the instant case, the court considered the parent's ability to pay in deciding what was a "reasonable portion" in the 1977 order awarding custody of the Biggers children to the Department. It found that Mr. Biggers made \$100.00 per week and thus ordered him to pay \$25.00 per week for his children's support while they were in the Department's custody. Respondent later agreed to pay \$100.00 a month for the children's care (plan of care agreement, 6 October 1978). At the time, she was employed at Craftsman Fabrics, and the amount agreed to was surely based upon her ability to pay according to her wages and the needs of the children. Finally, in the termination order itself, the court found that respondent, despite her agreement to do so and her ability to be gainfully employed, had failed to pay "*any sums whatsoever*" for her children's support while they were in foster care for over two years.

All parents have the duty to support their children within their means, and the State, as the *parens patriae* of all children, may enforce that duty to prevent children from becoming public charges. 3 Lee, N.C. Family Law § 229 (3d ed. 1963). In G.S. 7A-289.32(4), the legislature has concluded that a child's best interest is served by a termination of parental rights when his parents cannot provide reasonable support. This statute meets the standard of strict judicial scrutiny, where fundamental rights are involved, under the equal protection

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clause. The State undoubtedly demonstrates a compelling interest for the health, welfare and safety of minor children, and this interest is directly related to the purpose of the statute. *See also N.C. Ass'n for Retarded Children v. State of N.C.*, 420 F. Supp. 451 (M.D.N.C. 1976); *In re Johnson*, 45 N.C. App. 649, 263 S.E. 2d 805 (1980). "It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse." *In re Lassiter*, 43 N.C. App. 525, 527, 259 S.E. 2d 336, 337 (1979), *review denied*, 299 N.C. 120, 262 S.E. 2d 6 (1980). In sum, we conclude that G.S. 7A-289.32(4) does not violate the equal protection clause by discriminating among persons similarly situated since it applies to all parents equally and allows due consideration of their specific individual financial circumstances.

[2] Respondent further argues that G.S. 7A-289:32 is unconstitutionally vague. Our Supreme Court has enunciated the principles of the vagueness doctrine as follows:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo*, 332 U.S. 1, 91 L. Ed. 1877, 67 S. Ct. 1538.

In re Burrus, 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969), *aff'd*, 403 U.S. 528, 91 S. Ct. 1976 (1971) (citations omitted). a statute must be examined in light of the circumstances in each case, and respondent has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. *State v. Covington*, 34 N.C. App. 457, 238 S.E. 2d 794, *review denied*, 294 N.C. 184, 241 S.E. 2d 519 (1977). Respondent cannot meet this burden with respect to G.S. 7A-289.32(2) and (4).

G.S. 7A-289.32(2) provides that parental rights can be terminated if the child is neglected within the meaning of G.S. 7A-278(4). The applicable definition states that a

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“[n]eglected child” is any child who does not receive proper care or supervision or discipline from his parent, guardian, custodian or other person acting as a parent, or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

G.S. 7A-278(4). Our Court has not found it difficult to give a precise meaning to this definition of a neglected child in particular cases by analyzing the factual circumstances before it and weighing the compelling interests of the State with those of the parents and child. *In re Cusson*, 43 N.C. App. 333, 258 S.E. 2d 858 (1979); *In re McMillan*, 30 N.C. App. 235, 226 S.E. 2d 693 (1976). *See also In re Yow*, 40 N.C. App. 688, 253 S.E. 2d 647, *review denied*, 297 N.C. 610, 257 S.E. 2d 223 (1979). Viewed in this light, G.S. 7A-289.32(2) is not vague because the terms used in G.S. 7A-278(4) are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and parents are, therefore, given sufficient notice of the types of conduct that constitute child neglect in this State. *See* 17 Ariz. L. Rev. 1055, 1070 (1975).

G.S. 7A-289.32(4) is also constitutionally clear. In no uncertain terms, it permits termination of parents' rights when they do not pay a reasonable portion of their child's foster care costs for six months preceding the filing of the petition. In this case, respondent was given even more specific notice in the plan of care agreement she signed with the Department on 6 October 1978. She promised to pay \$100.00 a month for child support, and she was aware that the Department would decide within thirty-one days, among other things, whether to seek termination of her parental rights. In addition, we have already indicated that the judge does not have unbridled discretion in determining what a "reasonable portion" is. As with child support orders, this determination must be based upon an interplay of "(1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980); G.S. 50-13.4(c).

We note that vagueness challenges to similar statutes have been increasingly made across the nation, but they have been almost uniformly rejected. *See* Comment, Application of the Vagueness Doctrine

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to Statutes Terminating Parental Rights, 1980 Duke L. J. 336, 341; Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the *Parens Patriae* Rationale, 16 J. Fam. L. 213, 232 (1977-78); 70 Colum. L. Rev. 465, 469 (1970). *But see Davis v. Smith*, 266 Ark. 112, 583 S.W. 2d 37 (1979); *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F. 2d 1137 (8th Cir. 1976). An "impossible standard of statutory clarity" would be inappropriate in cases involving child care and custody. "What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests." *State v. McMaster*, 259 Or. 291, 296, 486 P. 2d 567, 569 (1971) (rejecting a vagueness claim to the Oregon statute for termination of parental rights). *Accord*, *In re Daniel H.*, 591 P. 2d 1175 (Okla. 1979). This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process. Otherwise, the clear legislative intent of Article 24B would be frustrated:

- § 7A-289.22. Legislative intent; construction of Article. — The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:
- (1) The General purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.
 - (2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
 - (3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.

To enforce these policies of Article 24B, we hold that the provisions of G.S. 7A-289.32(2) and (4) are sufficiently definite to be applied in a

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uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit.

[3] Respondent makes the final assertion that the evidence was insufficient to support the court's findings of fact in the termination order of 7 December 1979. Respondent, however, did not except to any of those findings as required by Rule 10(b)(1) of the Rules of Appellate Procedure, and does not, in addition, advance any argument in support of this position in her brief. Thus, the only question is whether the findings support the judgment. *City of Kings Mountain v. Cline*, 281 N.C. 269, 188 S.E. 2d 284 (1972). It suffices to say that the Department presented overwhelming and uncontradicted evidence which supports the court's findings that these children were neglected and that their parents had failed to pay reasonable child support for their care. Without question, these findings support the judgment terminating respondent's parental rights. In such circumstances, it is in the children's best interests that parental rights be terminated so that permanent adoptions can proceed to provide them with a secure, capable family. Otherwise, helpless children might be left to "grow up in 'legal limbo' in foster homes at public expense." Thomas, Child Abuse and Neglect, 50 N.C. L. Rev. 293, 341 and n. 173 (1972).

The judgment is affirmed.

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

EMILY B. CONE v. ALAN W. CONE

No 8018SC234

(Filed 20 January 1981)

Husband and Wife § 11.1— separation agreement — release of rights to proceeds of sale of entirety property

In an action by plaintiff against her former husband to recover funds from the sale of entirety property or in the alternative an undivided interest in property purchased by the husband with proceeds from the sale of the entirety property, and for an accounting concerning plaintiff's share of stock in an investment corporation, trial court properly granted summary judgment for defendant where the pleadings and affidavits of the parties showed that the parties, by execution of a separation

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agreement and a later amendment, intended to effect a final settlement of their respective rights concerning all property and shares of stocks acquired by the parties during their marriage, and the separation agreement and amendment expressly governed the matters complained of by plaintiff in her complaint and therefore precluded her recovery in this action.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 26 October 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 September 1980.

Plaintiff instituted this action against her former husband for an accounting and declaration of a trust. In her first claim for relief, plaintiff alleged that during her marriage to the defendant he used proceeds from the sale of tenancy by the entirety property (hereinafter the Sunset Drive property) to purchase property titled solely in his name (hereinafter the Country Club Road property, sometimes referred to in the documents quoted herein as the Country Club *Drive* property). Plaintiff demanded that the court order defendant to hold in trust for plaintiff an undivided interest in the Country Club Road property commensurate with her contribution to the purchase of that property through her share of the proceeds from sale of the Sunset Drive property. In the alternative, plaintiff demanded that defendant pay to plaintiff an amount equal to one half the proceeds from sale of the Sunset Drive property plus interest.

In her second claim for relief, plaintiff alleged that during her marriage to defendant he caused her single share of stock in A & E Investment Corporation, which plaintiff, defendant and a third party incorporated, to become diluted through the issuance of additional shares and two mergers. Plaintiff asserted that defendant, as controlling officer, director and shareholder of each of the three corporations (A & E and the two into which it was merged, namely, Royal-O-Apparel Company and Tareyton Corporation), had a fiduciary duty to protect the rights of plaintiff with respect to the issuance of shares and the mergers of the corporations; and that defendant breached his fiduciary duty to plaintiff. Plaintiff, therefore, demanded that defendant account to the plaintiff concerning the stock and merger transactions and compensate her for the damages she sustained as a result of defendant's breach of fiduciary duty.

In his answer, defendant denied that he caused title to the Country Club Road property to be issued to himself individually in an attempt to deprive plaintiff of her share of the proceeds from sale of the Sunset Drive property. He further denied any breach of fiduciary duty

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with respect to the stock and merger transactions. In separate defenses, defendant asserted that by executing a separation agreement on 9 October 1974 and an amendment thereto on 9 April 1976, the parties settled all property rights as against each other. The defendant also asserted that plaintiff waived any right she may have had to subscribe to the capital stock of A & E Investment Company; that she ratified the issuance of said stock to defendant; and that even if plaintiff owned stock in A & E Investment Company, she surrendered such stock at the time A & E merged into Royal-O-Apparel Company. Defendant pleaded both the three and ten year statutes of limitation as bars to all of plaintiff's claims and alleged that plaintiff's complaint failed to state a claim upon which relief might be granted.

Plaintiff and defendant each moved for summary judgment. The trial court granted defendant's motion and denied plaintiff's motion. Plaintiff appeals. Additional facts necessary for consideration of the appeal will be set forth in the opinion.

John R. Ingle and William Y. Wilkins for plaintiff-appellant.

Mary F. Cannon, Z. H. Howerton, Jr. and Luke Wright for defendant-appellee.

WHICHARD, Judge.

Plaintiff contends the trial court erred in granting defendant's motion for summary judgment and in denying hers. The court properly granted defendant's motion if the pleadings and affidavits demonstrate that no genuine issue as to any material fact exists and that defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56 (c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Best v. Perry*, 41 N.C.App. 107, 109, 254 S.E.2d 281, 283 (1979).

The pleadings and affidavits presented by plaintiff allege that she did not receive any of the proceeds from the sale of the Sunset Drive property which the parties held as tenants by the entirety. They also allege that defendant used plaintiff's share of said proceeds to purchase an interest in the Country Club Road property which he placed solely in his name. These facts, standing alone, establish a claim by plaintiff against defendant based upon resulting trust. A resulting trust arises

when a person becomes invested with a title to real property under circumstances which in equity obli-

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gate him to hold the title and to exercise his ownership for the benefit of another. Under such circumstances equity creates a trust in favor of such other person commensurate with his interest in the subject matter. A trust of this sort does not arise from or depend upon any agreement between the parties. It results from the fact that one's money has been invested in land and the conveyance taken in the name of another.

Deans v. Deans, 241 N.C. 1, 6-7, 84 S.E.2d 321, 325 (1954) *quoting from* *Teachy v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938).

Defendant, however, denied plaintiff's allegation that she did not receive her share of the proceeds from sale of the Sunset Drive property and denied that he used her money to purchase the interest in the Country Club Road property. In addition, defendant contended that plaintiff relinquished any ownership interest she may have had in the Country Club Road property and any claim she may have had to the proceeds from sale of the Sunset Drive property when she voluntarily executed a separation agreement for the stated purpose of "adjust[ing] and settl[ing] the differences between them concerning the individual rights of each and all other questions affecting the interest of each of them." Defendant contended, therefore, that regardless of any claim plaintiff may have had against him prior to execution of the separation agreement, that agreement legally bound plaintiff and controlled any dispute which arose between the parties concerning events which took place prior to their separation.

Defendant moved for summary judgment and filed an affidavit in which he contended:

That by entering into the CONTRACT AND AGREEMENT OF SEPARATION and the AMENDMENT TO CONTRACT AND AGREEMENT OF SEPARATION, he and the plaintiff adjusted and settled all of their property rights, each against the other; that he has complied fully with the terms of the CONTRACT AND AGREEMENT OF SEPARATION and the AMENDMENT TO CONTRACT AND AGREEMENT OF SEPARATION, paying to the plaintiff all sums of money to which she was or is entitled, and now the plaintiff has no further claim

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whatsoever against him.

Defendant had filed the separation agreement and amendment as exhibits with his answer, and he referred to his answer and exhibits in support of the summary judgment motion. By this motion, defendant forecast evidence which would be available to him at trial which tended to establish his right to judgment as a matter of law. When a party, in a motion for summary judgment, presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion "must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief." *Best*, 41 N.C.App. at 110, 254 S.E.2d at 284, *citing* 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed., Phillips Supp. 1970). Defendant pleaded the existence of a contract which on its face settled the interests and rights of the parties which arose out of their marriage. He thereby placed the onus on the plaintiff to forecast evidence to establish that the separation agreement did not bar her right to recover. "If the [plaintiff] does not respond . . . with a forecast of evidence which will be available at trial to show that the defending party is not entitled to judgment as a matter of law, summary judgment should be entered in favor of the defending party." *Best*, 41 N.C.App. at 110, 254 S.E.2d at 284.

The law is well established that in the absence of a showing of fraud, mutual mistake, duress, illegality or undue influence in the execution of a contract, a party to an otherwise valid contract cannot avoid its operation. 1 *Williston on Contracts* § 15 at 28 (3d ed. 1957); *see also Financial Services v. Capitol Funds*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975) (mutual mistake of fact); *Chemical Co. v. Rivenbark*, 45 N.C.App. 517, 520, 263 S.E.2d 305, 307 (1980) (fraud, duress); 3 Strong's North Carolina Index, *Cancellation and Rescission* § 1 at 5-6 (1976). In her complaint, plaintiff alleged:

the defendant used the proceeds from the sale of the real property owned by the parties as tenants by the entirety . . . and caused title to the newly acquired real property . . . to be vested in his name only for the purposes of depriving the plaintiff of her equity in the proceeds of said sale of the Sunset Drive residence and her right of ownership as tenant by the entirety of said Country Club Drive residence of the parties.

Although the quoted allegation may have been sufficient to allege

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fraud on the part of defendant with respect to the transaction by which he acquired title to the Country Club Road property, the allegation does not charge fraud *in the execution of the separation agreement*. Therefore, plaintiff's *complaint* fails to forecast evidence which would establish that the separation agreement did not terminate her ownership rights in the proceeds from sale of the Sunset Drive property or in the Country Club Road property.

Further, plaintiff's *motion for summary judgment* and supporting affidavit failed to meet defendant's contention that the separation agreement and amendment controlled as to the respective rights and interests of the parties in real property owned or occupied by them during their marriage. The motion and affidavit merely restated the contention set forth in plaintiff's complaint that defendant used the proceeds from tenancy by the entirety property to purchase an interest in real property titled solely in his name. They failed to mention the 1974 agreement and 1976 amendment or to present any reason the agreement and amendment should not control. Rule 9 (b) of the North Carolina Rules of Civil Procedure, G.S. 1A-1, requires that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiff's allegations do not state with particularity any circumstances amounting to fraud, duress or mistake in the execution of the agreement and amendment. Therefore, the trial court properly determined that these documents controlled the disposition of the action.

The North Carolina Supreme Court discussed the interpretation of separation agreements in the case of *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973). Justice Sharp (later Chief Justice), speaking for the court, stated the general rule of construction as follows:

Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution. (Citations omitted.)

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the

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purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning. (Citations omitted.)

Lane, 284 N.C. at 409-410, 200 S.E.2d at 624. The court must construe the language of the contract according to its ordinary meaning, and in light of the stated purpose of the parties in executing the contract, to ascertain the intention of the parties with respect to particular provisions. In addition, the court may imply terms if the language of the contract and the circumstances surrounding its execution raise an inference that the parties intended the terms implied. As Justice Sharp stated in *Lane*,

"Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made." 17 Am. Jur. 2d *Contracts* § 255 at 649 (1964). However, "[n]o meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions." 17 Am. Jur. 2d *Contracts*, *supra* at 652.

284 N.C. at 410-411, 200 S.E.2d at 625.

In applying these rules of construction to the agreement and

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amendment to determine whether by their execution plaintiff relinquished her rights in the properties in question, we find that the parties stated in the preamble the reason for executing the 1974 agreement as follows:

WHEREAS, the conditions and causes which existed for some time prior to the separation aforesaid still exist, and in all probability the said conditions and causes will continue to exist; and whereas, the parties hereto have decided that it will be for their best interests, and for the best interest of each of them, to make and enter into this contract and agreement in order to adjust and settle the differences between them concerning the individual rights of each and all other questions affecting the interest of each of them

In the body of the agreement the parties agreed, with respect to two tracts of tenancy by the entirety property not involved here, that plaintiff would execute the documents necessary to vest title solely in defendant or his assigns. With respect to the Country Club Road property the 1974 agreement contained the following provision:

FOURTH: The house and lot at 806 Country Club Drive in the City of Greensboro, North Carolina, now occupied by the parties hereto and owned by the party of the first part [defendant herein] may be used by the party of the second part [plaintiff herein] for a period of two years from the date of this instrument as her residence. The party of the first part shall make available to the party of the second part a sum not to exceed \$125,000.00 for the purchase and furnishing of a residence to be owned by the party of the second part and agrees to pay over to the party of the second part said sum at her request. During the two-year period in which the party of the second part may occupy the residence at 806 Country Club Drive, the party of the first part shall pay to the party of the second part the sum of \$750.00 per month as a housing allowance. The payment of said sum shall cease when the party of the second part no longer occupies said residence.

The parties amended this portion of the 1974 agreement through the following provision in the 1976 amendment:

1. Paragraph or Item Fourth of said Contract and Agree-

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ment of Separation dated October 9, 1974, is hereby stricken and cancelled in its entirety, and in lieu thereof there shall be substituted the following Paragraph or Item Fourth:

Fourth: The house and lot at 806 Country Club Drive in the City of Greensboro, North Carolina, occupied by the parties hereto prior to October 9, 1974, and now occupied by the party of the second part and owned by the party of the first part, shall be vacated by Emily Bundy Cone, the party of the second part, no later than Thirty (30) days after the party of the first part vacates the Condominium Unit hereinafter described and delivers the keys thereto to the party of the second part. In consideration of the agreement by said party of the second part to vacate the house and lot known as 806 County (sic) Club Drive, said party of the first part does hereby agree (a) to continue to pay all reasonable costs and expenses incurred by the party of the second part for the operation, upkeep, and maintenance of said property until she vacates the premises, but not beyond the expiration of the aforesaid Thirty (30) day period; and (b) to give, grant, convey and confirm unto the party of the second part, contemporaneously with the execution of this instrument, all of his right, title and interest in and to those certain premises described in Condominium Unit Deed dated May 14, 1975, filed May 23, 1975, in Book 2759, Page 450, in the Guilford County Public Registry, as her sole property, subject to any restrictive covenants, easements and rights of way of record, if any, and to that certain Deed of Trust dated May 19, 1975, filed May 23, 1975, from Alan W. Cone to Joseph L. Carlton, Trustee for Winston-Salem Savings & Loan Association in Book 2766, Page 443, which the party of the second part agrees to assume and pay. The party of the first part shall promptly vacate the premises of said Condominium Unit and deliver the keys thereto to the party of the second part. The party of the first part has heretofore made available to the party of the second part the sum of One Hundred Twenty-Five Thousand Dollars (\$125,000.00) for the purchase of a certain tract or parcel of real estate, the receipt of which sum is acknowledged by the party of the second part, and the said party of the first part does hereby waive, release and bar himself from any and all

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rights in and to any and all of said \$125,000.00 or real or personal property into which said sum of money might have been invested and said party of the second part may transfer and convey her interest therein without the joinder of the party of the first part.

The language of the foregoing provisions, apparently agreed upon by the parties with the advice and assistance of counsel, is unambiguous. The parties proposed to settle all "differences between them concerning the individual rights of each and all other questions affecting the interest of each" The language of the 1974 agreement indicates that plaintiff acknowledged defendant's ownership of the Country Club Road property, if not before the execution of the agreement, at least from that time forward. Plaintiff agreed to possess and occupy the property only temporarily after the separation. In provision *FOURTH* of the agreement plaintiff agreed to relinquish possession of the property to defendant after two years in exchange for defendant's agreement to pay plaintiff \$125,000.00 for the purchase of property for her own residence. Later, in the 1976 amendment, plaintiff agreed to vacate the Country Club Road property within 30 days after the occurrence of a stated event, in consideration of defendant's promise to convey to plaintiff certain condominium property. Plaintiff, when she executed the 1976 amendment, acknowledged receipt from defendant of the sum of \$125,000.00 for the purchase of real estate. Defendant waived all rights in the \$125,000.00 and in all real or personal property into which the sum might have been invested. In light of the stated purpose for the written agreement, and the fact that the parties specifically provided for the possession and transfer of possession of the Country Club Road property in exchange for a payment of money and the conveyance of real property, we find that the parties intended to effect a final settlement of their respective rights in the Country Club Road property, and thus in the proceeds from sale of the Sunset Drive property, by their execution of the 1974 and 1976 documents.

One additional provision in the 1974 agreement further indicates plaintiff's intention to relinquish all such ownership right and interest. The provision, a waiver and release, is as follows:

TWELFTH: That, except as hereinabove provided, the party of the second part hereby waives, releases and bars

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herself from any and all rights in and to any and all real estate or personal property now owned or hereafter owned or acquired by the party of the first part, and henceforth the party of the first part may convey his real estate and personal property without the joinder of the party of the second part.

Plaintiff by this provision expressly waived any rights in and to the Country Club Road property, which she had acknowledged earlier in the agreement to have been "owned by" the defendant.

With respect to stocks owned by each of the parties, the original separation agreement provided:

NINTH: That the party of the first part has heretofore made certain gifts of stocks, bonds and securities to the party of the second part, which party of the second part shall retain as her own property free and clear of any claims by the party of the first part. The party of the first part shall give to the party of the second part a true and accurate accounting of said stocks, bonds and securities within ten (10) days after the date of this Agreement.

The 1976 amendment provided:

4. It is mutually understood and agreed that the said Contract and Agreement of Separation dated October 9, 1974, is hereby amended by adding thereto the following new Paragraphs or items:

Sixteenth: That the party of the second part is owner of Three Hundred Fifty (350) shares of the common stock of Tareyton Corporation, a North Carolina corporation with its principal office in Greensboro, North Carolina; that the party of the first part on the date of execution of this Agreement is in control of said Tareyton Corporation by ownership of a majority interest in the common stock therein; that by this Agreement, said party of the first part agrees, at the election of said party of the second part, to do either of the following: (1) to purchase said Three Hundred Fifty (350) shares of the common stock of Tareyton Corporation from said party of the second part at the book value per share as shown on the financial statement certified to by

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the corporation's accounting firm as of the last day of the fiscal period immediately preceding the time of such election; or (2) to protect the value of said Three Hundred Fifty (350) shares owned by the party of the second part by agreeing herein that, in the event of sale by said party of the first part, directly or indirectly, of his controlling interest in said Tareyton Corporation, he will afford the party of the second part full opportunity to dispose of her shares at the same time and in the same manner as the party of the first part disposes of his shares, and, if she elects to do so, the party of the first part will take such action as necessary in order for the party of the second part to dispose of her shares in Tareyton Corporation, on the same terms and conditions and for the same price per share, as the said party of the first part disposes of his own shares in said Tareyton Corporation.

As with the claims regarding real property, the intention of the parties at the time they executed the 1974 and 1976 documents, as expressed by the unambiguous language of those documents, was to settle finally all disputes regarding the shares of stock acquired by the parties during their marriage.

Therefore, we hold that plaintiff and defendant intended, when they executed the separation agreement and amendment, that the agreement and amendment would operate as a final settlement of all rights and claims which arose or might have arisen during or as a result of their marital relationship. We further hold that the 1974 contract and agreement of separation and the 1976 amendment expressly governed the matters complained of by plaintiff in her complaint and precluded her recovery in this action. Thus, the trial court properly entered summary judgment for defendant.

We note that the 1976 amendment contained the following provision:

Twenty First: Each of the parties shall, from time to time, at the request of the other, execute, acknowledge, and deliver to the other party any and all further instruments that may be reasonably required to give full force and effect to the provisions of this amended Agreement.

Plaintiff agreed by this provision to execute, acknowledge and deliver

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to defendant any instrument necessary to effect the transfer of any interest she had during the marriage in the Country Club Road property.

Because of our holding that the separation agreement and amendment settled all claims between plaintiff and defendant, we need not discuss whether the statutes of limitation barred plaintiff's claims.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and HILL concur.

ENGLISH W. SHIELDS AND MUTUAL SAVINGS & LOAN ASSOCIATION OF
REIDSVILLE, NORTH CAROLINA v. NATIONWIDE MUTUAL FIRE INSUR-
ANCE COMPANY

No. 8017SC402

(Filed 20 January 1981)

Damages § 17.7—insurer's denial of claim — punitive damages — summary judgment for insurer proper

In an action to recover compensatory and punitive damages allegedly resulting from the destruction by fire of a building owned by plaintiff and insured by defendant, trial court did not err in granting summary judgment for defendant on the issue of punitive damages, since the fact that defendant denied plaintiff's claim on its belief, based on its investigation, that plaintiff was involved in the fire did not show bad faith on the part of defendant; the claim was not denied until some 19 months after the fire, during which time the investigation continued; and upon the information obtained in that investigation, defendant denied the claim.

APPEAL by plaintiff from *Long, Judge*. Judgment entered 20 November 1979, Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 16 October 1980.

By this action plaintiff seeks compensatory and punitive damages allegedly resulting from the destruction by fire of a building owned by him and insured by defendant. The court allowed defendant's motion for partial summary judgment as to punitive damages and denied the motion as to compensatory damages. Plaintiff appeals from the order dismissing his claim for punitive damages. The following appears in the record "Pursuant to order, stipulation, and agree-

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ment of the parties, defendant is presenting its appeal to that part of the order denying its motion for partial summary judgment regarding plaintiff's claim for compensatory damages for defendant's alleged tortious conduct." Facts necessary for decision appear in the opinion below.

Griffin, Post, Deaton and Horsley, by William F. Horsley, and Harrington, Stultz and Maddrey, by Joseph G. Maddrey, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson, by W. Thompson Comerford, Jr., for defendant appellee.

MORRIS, Chief Judge.

In substance, plaintiff's allegations supporting his claim for punitive damages were these: the loss by fire occurred on 6 July 1976, within the 60-day period for which the policy provided and on 25 August 1976, plaintiff, through his attorney, mailed defendant a proof of loss on a form furnished by defendant. On 13 September 1976, after the expiration of the 60-day period, a fact well known to defendant, defendant advised plaintiff that it could not accept "this paper as a sworn statement in proof of loss." Prior to receipt of the proof of loss, and on 3 August 1976, defendant cancelled plaintiff's insurance coverage, including coverage on other properties. Prior to the issuance of the policy upon which suit is brought, defendant's agent appraised the property to be insured at \$140,000 and offered to insure it for \$126,000. By implication, defendant has claimed that plaintiff grossly overinsured the property, and has also implied that plaintiff had a motive for destroying the property. Although defendant, at the beginning, formed an intent to deny plaintiff's claim, it, nevertheless, required plaintiff to follow all requirements of the policy including forcing him to undergo a deposition and to undergo an \$11,000 expense for an appraiser. These things were done to harass and intimidate plaintiff to accept less than the full benefits due under the policy. Finally, defendant denied the claim and in the letter of denial "alleged, among other things, that plaintiff was involved in causing the fire and that he misrepresented facts to defendant concerning the loss. Neither of these allegations were (sic) true and they were made by defendant in careless and wanton disregard of the truth and in full knowledge that defendant did not have sufficient facts on which to base these allegations." Defendant knew, or should have known, that plaintiff was over 65 years of age and in poor health. "Throughout its handling of

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this claim, defendant has failed and refused to act expeditiously and in accordance with its obligation of good faith and fair dealing. It has, on information and belief, acted in a manner designed to deprive plaintiff of some, if not all, of his policy benefits and he is therefore entitled to an award of punitive damages for defendant's bad faith."

In *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), a case upon which both parties rely, and a case in which the Court reviewed the judicial history of attempts to obtain punitive damages in breach of contract cases, the plaintiff sought punitive damages in an action alleging breach of an insurance contract in that plaintiff had demanded payment of defendant insurer, and defendant had refused to pay. The allegations constituting the basis for plaintiff's claim for punitive damages were:

7. That from time to time the plaintiff has made known to defendant and its agents, servants and employees that he was in desperate need of the proceeds of said insurance policy to which he was entitled to satisfy pressing financial matters caused by the loss above mentioned, and by reason of a loss by fire with which defendant was familiar. Notwithstanding the knowledge of defendant of said conditions, the defendant has neither made nor offered to make payment to plaintiff or to negotiate a settlement of plaintiff's claim under said policy of insurance.

8. Defendant at said times knew that plaintiff had floor plan and financing arrangements with creditors in the regular course of business and that each day great and high costs of financing were being incurred by plaintiff. Defendant further knew that plaintiff had payments to make upon liens and deeds of trust which constituted an expense of his said business and that said obligations involved the payment of interest each day. Defendant further knew that by reason of the losses sustained by plaintiff and the failure and refusal of defendant to properly settle and pay plaintiff the sums to which he was entitled under the said policy of insurance for the two losses sustained by plaintiff, that plaintiff would not be able to effectively carry on his business and that it was essential that he receive from the defendant the sums to which plaintiff was entitled under

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said policy of insurance in a prompt and expeditious manner.

9. Defendant, notwithstanding the foregoing, in heedless disregard of the consequences which it knew plaintiff would experience by defendant's failure to comply with the terms of its policy of insurance and in an oppressive manner failed and refused to comply with the express terms of its policy of insurance issued to plaintiff.

10. That by reason of its heedless, wanton and oppressive conduct as aforesaid, defendant has subjected itself to the penalty of punitive damages, and the plaintiff is entitled to recover of defendant punitive damages in the sum of at least \$50,000.00.

291 N.C. at 110, 229 S.E. 2d at 300.

The Court held that the trial court, upon defendant's motion under Rule 12(b)(6), properly dismissed the punitive damages claim, because

The breach of contract represented by defendant's failure to pay is not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortious behavior. As in *King v. Insurance Co.*, *supra*, and *Ledford v. Travelers Indemnity Co.*, 318 F. Supp. 1333 (W.D. Okla. 1970), the allegations in the complaint of oppressive behavior by defendant in breaching the contract are insufficient to plead any recognizable tort. They are, moreover, unaccompanied by any allegation of intentional wrongdoing other than the breach itself even were a tort alleged. Punitive damages could not therefore be allowed even if the allegations here considered were proved. The trial court properly allowed defendant's motion to dismiss this claim.

291 N.C. at 114, 229 S.E. 2d at 302.

Plaintiff derives comfort and bases its position upon the following excerpt from *Newton*:

We need not now decide whether a bad faith refusal to pay a justifiable claim by an insurer might give rise to punitive damages. No bad faith is claimed here, nor are any facts

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alleged from which a finding of bad faith could be made. Insurer's knowledge that plaintiff was in a precarious financial position in view of his loss does not in itself show bad faith on the part of the insurer in refusing to pay the claim, or for that matter, that the refusal was unjustified. Had plaintiff claimed that after due investigation by defendant it was determined that the claim was valid and defendant nevertheless refused to pay or that defendant refused to make any investigation at all, and that defendant's refusals were in bad faith with an intent to cause further damage to plaintiff, a different question would be presented.

We are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.

On the other hand, because of the great disparity of financial resources which generally exists between insurer and insured and the fact that insurance companies, like common carriers and utilities, are regulated and clearly affected with a public interest, we recognize the wisdom of a rule which would deter refusals on the part of insurers to pay valid claims when the refusals are both unjustified and in bad faith. Punitive damages "have been allowed for a breach of duty to serve the public by a common carrier or other public utility. See: *Carmichael v. Southern Bell Telephone & Telegraph Co.*, 157 N.C. 21, 72 S.E. 619; *Hutchinson v. Southern R.R.*, 140 N.C. 123, 52 S.E. 263." *King v. Insurance Co.*, *supra* at 398, 159 S.E. 2d at 893. Suffice it to say that we are not called upon here to adopt or reject such a rule.

291 N.C. at 115-16, 229 S.E. 2d at 303-04.

We think plaintiff's reliance misplaced. Assuming *arguendo* that plaintiff has alleged sufficient facts constituting intentional wrongdoing other than the refusal to pay, and this is not before us, we are of the opinion that the trial court properly allowed defendant's motion for summary judgment as to the punitive damage claim. The materials before the court submitted by both plaintiff and defendant, includ-

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ing interrogatories and answers thereto, deposition testimony, affidavits and recorded interview with plaintiff, show the following:

In response to interrogatories, defendant answered:

The plaintiff misstated and misrepresented the value of the premises to be insured; the fact that he had not sought to obtain other insurance on the premises prior to the issuance of the defendant's policy; the amount of repairs and improvements to be made on the property covered by the policy of insurance, prior to the issuance of the policy; the amount of repairs or improvements made at the time of the fire on or about July 6th, 1976; the amount expended for materials and labor in connection with repair and improvements on the premises; the relationship between himself and previous owners of the property; the existence of liens, mortgages, deeds of trust or other encumbrances on the property at the time of the issuance of the policy and at the time of the fire; the purchase price of the property; the fair market value of the property; his involvement in or procurement of the fire which occurred on the property on or about July 6, 1976; his knowledge as to the perpetrator of the fire which occurred upon the property on or about July 6, 1976; the fact that he had never been refused insurance coverage at the time of the issuance of the policy in suit; the manner in which the fire occurred.

Further defendant responded "Information obtained by defendant indicates that this fire originated through either the direct setting by Mr. Shields, his acquiescence in the setting of the fire, or his procurement in the setting of the fire."

Plaintiff said that he bought the property for approximately \$70,000, that there was a first mortgage of \$29,500 to Mutual Savings and Loan, Reidsville, a second mortgage of \$15,000 to the seller and that he paid the seller \$25,000 in cash. He had been remodelling the building prior to the fire and had spent some \$18,000 to \$20,000, all of which was paid in cash, and that the receipts for the money were "placed on nails in the office and had been destroyed or lost in the fire." He had never been refused insurance by anyone. He had a fire in a building in Spray some fifteen years previously. That building was also being remodelled, and he received \$16,000 in settlement of the insurance coverage.

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In answers to interrogatories plaintiff indicated that the facts upon which he based his claim for punitive damages were that the groundless accusation that plaintiff was involved in the fire and that the insurance industry is a regulated one, akin to a public utility, and "The actions taken by defendants, its agents, servants and representatives actually engaged in by defendant and ratified by defendant, constitute a breach of its obligation to deal with its insured fairly and in good faith."

The affidavit of the SBI agent who investigated the fire revealed that it was determined that the fire was "probably the work of an arsonist" but that no law enforcement officer had determined the identity of the person who set the fire. The agent was aware of no evidence implicating plaintiff, and no criminal charges had been made as the result of the fire.

Defendant's agent who wrote the policy which is the basis of this litigation stated, by affidavit, that he inspected the premises, stated to plaintiff that he believed the property was worth \$140,000, and offered to insure up to 90% of that amount, or \$126,000. Plaintiff chose to purchase insurance in the amount of \$110,000, and the policy was written for that amount. His opinion as to the value was based on what the building would be worth after the renovations. Plaintiff told him he was going to spend \$87,000 on the building. When he went to examine the premises on 23 June he did not see any building materials there, but a lot of tearing down was going on. Plaintiff never advised the agent that anyone had a mortgage interest in the property, but the seller did so advise him. Plaintiff told him there were none. After the fire, the agent saw straw stacked up in one specific part of the building which had not been there when he came to inspect the premises on 23 June.

Plaintiff, by deposition, testified that some 10 or 12 years prior to this occurrence he had a fire loss on a building he was getting prepared to rent and that he did have insurance on that property. He bought the property involved in this action in 1976. He paid the seller \$25,000 down in \$100 bills, assumed a \$30,000 loan, and gave the seller notes for \$15,000 secured by a second deed of trust on the property. He talked with an agency other than defendant and was told that he could purchase \$100,000 insurance, but the coverage would have to be placed with two different companies. He had asked for \$100,000 because he thought that was what the property was worth based on

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what he had put in it and intended to put in it. This was two to four days after he bought the property when he "had not put much in it." He then went to defendant about insurance and defendant's agent who viewed the property. Plaintiff told him that he intended to "fix it into apartments." He planned for nine apartments. Plaintiff had four men working on the property, and he paid them in cash each week, but did not get a receipt. "I kept my records as to how much I was paying them set down on papers there on a little table thing. We had a little room fixed up for an office. They got burned, I guess. I had all of that in the building on Riverside Drive. I never kept any records of what I paid the men, however." He did not obtain a building permit. The seller told plaintiff that he had gotten one. Plaintiff did not recall whether he signed a note for the \$15,000 due the seller. He was to begin paying that when he began renting the apartments. He heard somebody say something about straw or hay "being in there after the fire," but he never saw any and did not smell kerosene or fuel oil in the building after the fire.

Defendant's claims supervisor testified, by deposition, that his suspicion was aroused by the fact that the fire occurred so quickly after issuance of the policy together with the fact that the notice of loss indicated that the fire started on the second floor "from unknown causes." He had no idea who burned the premises but was suspicious of plaintiff, having formed that opinion when he received Mr. Hill's report.

Linley Tate's deposition testimony was that he bought the property in 1975 for \$10,000 with the intent to renovate it and then sell it. He did very little work on it, but sold it to William Clyde Reagan for \$40,000 but did not remember when.

Reagan said he bought it in early 1975, paying \$10,000 in cash as a down payment and financed \$30,000 through the Mutual Savings and Loan. He obtained insurance in the amount of \$100,000. He spent approximately \$20,000 in repairing the property before selling it to plaintiff.

Defendant caused a thorough investigation to be made. The investigation was "a result of a joint effort by the defendant's consultants, agents and under the direction of defendant's attorneys." Some seven reports were made to defendant. These were not subject to discovery.

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We are not called upon to say whether the uncontradicted evidence presented on motion for summary judgment is sufficient to withstand a motion for directed verdict in the claim for compensatory damages, yet to be heard. In our opinion, the materials submitted to the trial tribunal are clearly insufficient to support a claim for punitive damages. The fact that the defendant denied plaintiff's claim on its belief, based on its investigation, that plaintiff was involved in the fire certainly does not show bad faith on the part of the defendant. The claim was not denied until some 19 months after the fire. Defendant's investigation continued during that time. Upon the information obtained in that investigation, defendant denied the claim. We do not express an opinion as to whether the denial was justified. We simply say the materials presented clearly show no entitlement to punitive damages.

Defendant attempts to bring forward for our review the question of whether the court erred in denying its motion for partial summary judgment on the compensatory damages claim. Denial of a motion for summary judgment is not immediately appealable. Movant properly preserved its exception to the entry of the judgment and this exception can be considered on appeal from the final judgment without substantial harm to defendant. *Golden v. Golden*, 43 N.C. App. 393, 258 S.E. 2d 809 (1979).

As to plaintiff's appeal from the order allowing defendant's motion for summary judgment — affirmed.

As to defendant's attempted appeal from the denial of its motion for summary judgment on the compensatory damages claim — dismissed.

Judges HEDRICK and MARTIN (Robert M.) concur.

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STATE OF NORTH CAROLINA v. MICHAEL DEAN KELLER

No. 8025SC561

(Filed 20 January 1981)

1. Criminal Law § 40— admissibility of testimony given at former trial — unavailability of witnesses

The trial court properly found that a witness was unavailable so as to permit the introduction of a transcript of testimony given by the witness at a prior trial of defendant where the evidence tended to show that the SBI made an investigation to determine the whereabouts of the witness but was unable to locate him, a subpoena was issued for the witness in the county of trial but not in the county of the witness's place of residence, and the witness had not been in his county of residence for more than a year. Furthermore, the trial court properly found that the testimony of a second witness was unavailable so as to permit the introduction of a transcript of his testimony given at the prior trial of defendant where the witness was present in the courtroom but asserted his right against self-incrimination and refused to testify in violation of a plea bargain agreement.

2. Criminal Law § 106.5— testimony of accomplice — sufficiency for conviction

There is no merit in defendant's contention that the uncorroborated testimony of an accomplice should not be sufficient to support a conviction when it is contrary to that offered by other witnesses more reliable than the accomplice and when the accomplice has committed perjury in a previous trial concerning the same transaction, and the testimony of an accomplice in this case was sufficient to support defendant's conviction of second degree murder.

3. Criminal Law § 117.3— testimony in return for agreement not to prosecute — instructions

The trial court did not err in failing to instruct the jury that two witnesses who testified pursuant to an agreement that they would not be prosecuted for certain charges against them were interested in the verdict, the trial court's instruction on the credibility of the witnesses being sufficient where the court instructed that if either or both of the witnesses testified in whole or in part because of such concessions, the jury should examine the testimony of that witness with great care and caution, and that if the jurors should believe the testimony in whole or in part, they should treat what they believed the same as any other reliable evidence.

4. Criminal Law § 117.4— accomplice testimony — instructions

The trial court did not err in failing to instruct the jury that an accomplice is *guilty*, as an accomplice, of the crime charged against defendant.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 14 December 1979 in Superior Court, CALDWELL County. Heard in the Court of Appeals 17 October 1980.

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The defendant was previously convicted of first degree murder. That verdict was overturned and a new trial ordered. During the second trial, over objection by the defendant, the State was permitted by the trial judge to introduce testimony of two witnesses taken at the previous trial. Defendant was convicted of second degree murder and sentenced to not less than 50 years nor more than 60 years' imprisonment. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

McElwee, Hall, McElwee & Cannon, by John E. Hall, for defendant appellant.

HILL, Judge.

[1] At defendant's second trial, one witness for the prosecution was not present in the courtroom. Another witness for the prosecution was present but refused to testify.

The trial court, in the absence of the jury, heard testimony and arguments of counsel, upon objection by defendant to the introduction into evidence by the State of a transcript of the testimony of witness Jerry Lyn Morrison. The testimony was given at a prior trial of this case in September, 1978, in the Superior Court for Caldwell County.

The trial court made the following findings of fact:

1. Jerry Lyn Morrison was a material witness for the State at the previous trial and his testimony is material to the State at this trial.

2. At the previous trial Morrison was examined by the District Attorney and cross examined by the defendant's counsel who also now represent the defendant.

3. At the time at the first trial Morrison resided with his wife and 2 children in Alexander County, North Carolina. On November 1, 1978, he left his home driving his wife's car after telling her that he would return the next day, but without stating where he was going. The next day she discovered her automobile in a church parking lot in Stony Point, North Carolina. She has not seen or heard from Morrison since November 1, 1978.

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4. Morrison's mother, who lived next door to him, has not seen or heard from her son since November 1978.

5. Morrison's attorney who was representing him at the time of the first trial of this case has not heard from him since that time.

6. The State through an Agent of the State Bureau of Investigation have [sic] since last August 1979 made inquiry as to Morrison's whereabouts by interviewing residents of his neighborhood, former friends and associates and through other law enforcement agencies but have [sic] been unable to learn his whereabouts.

7. Morrison is unavailable to testify at this trial and the State has made a reasonable, sufficient effort to ascertain his whereabouts without success.

The trial court then concluded that a properly authenticated transcript of Morrison's testimony at the prior trial could be introduced into evidence by the State at the second trial.

Defendant excepted to the order entered by the trial judge, claiming there was no evidence that a subpoena was issued in Alexander County for Morrison and no evidence that the Sheriff of Alexander County or any of his deputies in charge of serving subpoenas for that county attempted to locate him. Defendant further contended the State had not shown a good faith effort to bring the witness into court.

We must first determine if the facts found by the trial judge are sufficient to support his conclusion. Subpoena for Morrison was issued in Caldwell County, the place of trial, but no subpoena was issued in Alexander County, the witness's place of residence. There is evidence that the witness had not been in his county of residence for a year or more. Nor has defendant shown a greater probability of locating the witness if a subpoena had been issued for Alexander County. The trial court's findings show the State exercised due diligence in searching for Morrison. Defendant's objection to the trial court's order is without merit.

The witness, Jackie Rand Robinette, was present at court, but refused to testify. The trial judge made findings of fact and conclusions as follows:

1. Jackie Rand Robinette was charged in a bill of indict-

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ment by the Grand Jury of Caldwell County in case 78CRS1691 with the first degree murder of Edward Lee Greene, the bill being returned at the February 1978 session.

2. At the same session in case 78CRS1692 Robinette was charged in a true bill with the first degree murder of Alfred Conrad Greene, Jr.

.....

5. On August 16, 1978, in the Superior Court for Caldwell County Honorable Thomas H. Lee, Judge Presiding, the defendant freely, intelligently and voluntarily entered, in each case, pleas of guilty to the felony of voluntary manslaughter. The pleas were tendered and accepted upon the following conditions: (1) The defendant agrees to prove truthful testimony on behalf of the State in the prosecution of 2 homicide cases against Michael Dean Keller wherein Alfred Conrad Greene, Jr., and Edward Lee Green were victims; . . .

.....

7. The defendant did appear as a witness for the State and testified at a prior trial in the case of *State vs. Michael Dean Keller*.

8. Keller was then represented by the same counsel as now represent him, and the defendant confronted and cross examined the witness.

9. On 11 December 1979, Robinette, being called to testify in the present trial, informed the Court that he refused to testify. On this date, under oath, Robinette again informed the Court that he refused to testify and acknowledged that this was in violation of the terms of his plea agreement with the State; that he discussed the matter with his attorney; that he understood the possible consequences of his refusal; and that he intelligently and voluntarily declined to testify in violation of the plea agreement.

10. Robinette is now unavailable to the State as a witness. His testimony is material and crucial to the State's case.

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11. The State relied upon the testimony of Robinette and was not aware that he would refuse to testify until 11 December 1979.

Based upon the foregoing, the Court concluded as a matter of law that the transcript of Robinette's testimony at the prior trial of this case could be introduced into evidence.

Defendant challenges the introduction of the transcripts of both witnesses' testimony. Defendant contends his right to confront any witness against him has been denied. Further, defendant contends the denial of the jury's right to look at the witnesses and examine their credibility as live witnesses denied him a fair trial.

Previously recorded testimony is authorized if:

- (1) the witness is unavailable;
- (2) the recorded testimony stems from a former trial of the same cause;
- (3) the current defendant was present at that time and represented by counsel.

Defendant herein concedes the requirements of items (2) and (3) are met, but argues that the witnesses were not unavailable.

Justice Denny has stated the rule in *State v. Cope*, 240 N. C. 244, 248-9, 81 S.E. 2d 773 (1954):

Ordinarily, testimony given by a witness in a . . . former trial, will not be admitted as substantive evidence in a trial unless it is impossible to produce the witness. The witness himself, if available, must be produced and testify *de novo*. (Citations omitted.)

Defendant points to three U.S. Supreme Court cases as arguments that the two witnesses were available. However, each of those cases is distinguishable on its facts from the case under consideration. In all of those cases the whereabouts of the witness was known, and the presence of the witness could have been obtained through the use of a subpoena or other process.

There was no evidence before the trial judge in this case as to the whereabouts of Morrison. He had simply disappeared. It appears from

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the record that the district attorney had used due diligence and every reasonable effort to have the witness present. Witness Robinette, though present, apparently was invoking his constitutionally guaranteed right to be free from self-incrimination. The important inquiry is whether Robinette's testimony was available, not whether he was. See *United States v. Milano*, 443 F. 2d 1022 (10th Cir.), *cert. denied* 404 U. S. 943, 30 L. Ed. 2d 258, 92 S. Ct. 294 (1971); *United States v. Wilcox*, 450 F. 2d 1131 (5th Cir. 1971), *cert. denied* 405 U. S. 917, 30 L. Ed. 2d 787, 92 S. Ct. 941 (1972); *United States v. Mobley*, 421 F. 2d 345 (5th Cir. 1970); *Mason v. United States*, 408 F. 2d 903 (10th Cir. 1969), *cert. denied*, 400 U. S. 993, 27 L. Ed. 2d 441, 91 S. Ct. 462 (1971).

Motions in regard to the use of transcripts of prior proceedings are addressed to the discretion of the trial judge. His ruling thereon will not be upset on appeal absent a showing of such abuse of discretion as would deprive a defendant of a fair trial. *State v. Holloway* and *State v. Jones*, 16 N.C. App. 266, 270, 192 S.E. 2d 75 (1972). We find no such abuse and no error. Defendant's assignment of error is overruled.

[2] Defendant next asserts the trial judge erred in denying his motion for nonsuit at the close of the State's evidence and at the close of all the evidence. Defendant contends the only evidence before the court sufficient to withstand a motion for nonsuit was the testimony of the witness Jackie Robinette.

Robinette previously had been tried and convicted in Statesville of solicitation to commit murder. There were material differences in the testimony offered by Robinette in the Statesville trial and the case now before the Court. No corroboration was offered to the testimony of Robinette, although a witness was available who would have corroborated Robinette.

The defendant acknowledges that the uncorroborated testimony of an accomplice standing alone is sufficient evidence to submit to the jury and to support conviction of a criminal offense. *State v. Horton*, 275 N. C. 651, 657, 170 S. E. 2d 466 (1969), *cert. denied* 398 U. S. 959 (1970), *reh. denied* 400 U. S. 857 (1970). Defendant contends, however, that such testimony ought not to be sufficient when it is contrary to that offered by other witnesses more reliable than the accomplice and when the accomplice has committed perjury in a previous trial concerning the same transaction as his testimony in this case. Defendant

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concedes he finds no North Carolina cases in support of his contention. Neither do we.

It has long been the rule in this State that the credibility of witnesses and the weight to be given to their testimony is exclusively a matter for the jury. *State v. Wilson*, 293 N. C. 47, 235 S. E. 2d 219 (1977). Further, upon a motion for nonsuit, the evidence for the State must be considered in the light most favorable to it; discrepancies and contradictions therein are disregarded. *State v. Witherspoon*, 293 N. C. 321, 326, 237 S. E. 2d 822 (1977). Defendant's assignment of error is overruled.

[3] Defendant further contends the trial judge erred in his charge to the jury regarding the weight to be given to testimony offered by witnesses Warren and Morrison, both of whom had testified pursuant to an agreement that they would not be prosecuted for certain charges against them. The trial judge instructed the jury that if either or both of the witnesses testified in whole or in part because of such concessions, the jury should examine the testimony of that witness with great care and caution. The jury was instructed that if they should believe the testimony in whole or in part, they should treat what they believed the same as any other reliable evidence.

Defendant contends the judge should have charged the jury that the two witnesses were interested in the verdict as provided by G. S. 15A-1052(c). The statute provides that,

In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury *as in the case of interested witnesses*. (Emphasis added.)

We do not find in the charge any prejudice toward the defendant. The charge is similar to that used by the trial court in *State v. Hardy*, 293 N. C. 105, 120, 235 S. E. 2d 828 (1977), in which the Supreme Court found no error:

There is evidence in these cases which tends to show that the witness, Green, is testifying under an agreement with the prosecutor for a charge reduction in exchange for his testimony; and under agreement with the prosecutor for recommendation for sentence concession in exchange for

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his testimony If you find this witness Green, testified in whole or part from these reasons you should examine this testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence in the case.

In the present case the charge was in substantial accord with that approved in *Hardy, supra*. Defendant's assignment is overruled.

[4] Finally, defendant contends the trial judge erred in his charge to the jury concerning the weight to be given Robinette's testimony.

The trial judge charged:

And there is evidence which tends to show that the witness Robinette was an accomplice in the commission of the crime charged in this case.

An accomplice is a person who joins with another in the commission of a crime. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of this witness with the greatest care and caution. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Defendant contends the court erred by failing to charge that when considering an accomplice's testimony, the jury should remember that an accomplice, by his own admission, is *guilty*, as an accomplice, of the crime charged against the defendant. *State v. Bailey*, 254 N. C. 380, 388, 119 S. E. 2d 165 (1961).

We note that charges subsequent to *Bailey, supra*, have been approved by our Supreme Court in which no recital is made that the accomplice is *guilty*, as an accomplice, of the crime charged against the defendant. See *State v. Hairston* and *State v. Howard* and *State v. McIntyre*, 280 N. C. 220, 234, 185 S. E. 2d 633 (1971), *cert. denied* 409 U. S. 888 (1972); *State v. Harris*, 290 N. C. 681, 228 S. E. 2d 437 (1976). Defendant's assignment of error is overruled.

For the reasons stated above, we find in defendant's trial

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No error.

Chief Judge MORRIS and Judge ARNOLD concur.

ZARN, INC. v. SOUTHERN RAILWAY COMPANY

No. 8017SC398

(Filed 20 January 1981)

1. Carriers § 10— damages to goods during shipment — no special or consequential damages

In an action to recover damages to plaintiff's storage bins while being transported by defendant carrier, the trial court did not err in granting partial summary judgment for defendant on the issue of special or consequential damages, since the wording of the Carmack Amendment to the Interstate Commerce Act restricts a plaintiff's recovery to the damage to the property itself, and does not allow incidental, special or consequential damages, unless plaintiff shows that the contract of carriage itself imposes such liability or that actual notice of the possibility of the injury was given to the carrier, and plaintiff made no such showing in this case.

2. Carriers § 10— goods damaged during shipment — measure of damages — instructions proper

In an action to recover for damages to plaintiff's storage bins while in transit, there was no merit to plaintiff's contention that the trial court erred in failing to instruct the jury as to the alternative measure of damages in the event the property had no market value and in failing to instruct the jury that it could consider the cost of replacement in determining the fair market value, since plaintiff did not specially request such an instruction, and the trial court's jury instruction adequately charged the jury on the ordinary measure of general damages.

APPEAL by plaintiff from *Wood (William Z.)*, Judge. Judgment entered 27 December 1979 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 15 October 1980.

This is an action against defendant railroad, a common carrier for hire, for damage to plaintiff's storage bins (silos) while in transit from Savannah, Georgia to Reidsville, North Carolina. In its complaint, plaintiff alleged that the silos were damaged by the negligence of defendant. Plaintiff alleged damages for: (1) the loss of the silos themselves; (2) the extra costs of locating and installing a replacement; (3) the loss of use of the silos for sixty-nine days. In its answer, defendant alleged that plaintiff had not notified defendant that plaintiff would incur special damages in the event of damage to the freight.

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The defendant having admitted liability, the parties stipulated that the only issue for determination at trial was the amount of damages.

The undisputed evidence in the record shows delivery of the property — two used twelve by forty foot silos — to the defendant carrier in good condition and the delivery of the property by defendant to plaintiff in damaged condition. Plaintiff refused to accept delivery of the damaged silos and defendant took possession of the silos for salvage purposes.

On motion of defendant, the trial court granted partial summary judgment against plaintiff finding “no genuine issue as to any material facts with reference to any special or consequential damages the plaintiff has incurred by reason of extra cost incurred in locating and installing replacement equipment, loss of storage capacity and overhead expense resulting from the loss of use of the bins.” In ruling on this motion the trial judge considered the affidavit of Robert G. Hartman, executive vice president for manufacturing of plaintiff. This affidavit indicated that plaintiff intended to use the silos for storage of plastic materials in connection with plaintiff’s plastic manufacturing business. Unlike silos used for other functions, silos used in the plastic industry must possess special design features. Therefore not all used silos were suitable for plaintiff’s special requirements. Hartman’s affidavit also indicated that the damage to the silos in transit was such that it was impossible to restore the silos’ special features without extensive repairs. There was evidence that subsequent to plaintiff’s refusal of the damaged silos plaintiff was unable to locate any used silos that were suitable. Plaintiff eventually purchased as a partial replacement a similarly sized new silo.

Based on the partial summary judgment the trial judge excluded some of the evidence of anticipated use and cost of repair, and instructed the jury on the measure of general damages for property injured or damaged by a carrier in the course of transportation. The sole issue presented to the jury and its answer are as follows:

What amount is the plaintiff entitled to recover from the defendant, Southern Railway Company?

ANSWER: \$10,000.00.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for plaintiff appellant.

Griffin, Post, Deaton & Horsley, by Hugh P. Griffin, Jr., and

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William F. Horsley, for defendant appellee.

WELLS, Judge.

[1] Plaintiff assigns as error: the trial court's granting of partial summary judgment on the issue of special or consequential damages; the trial court's formulation of the measure of general damages in the jury instructions; and, the trial court's exclusion of certain evidence. We first consider the order of partial summary judgment. The trial court's order of partial summary judgment provided in pertinent part as follows:

After reviewing the Court records, the affidavits, the briefs of counsel, and after hearing the arguments of counsel, the Court finds that there is no genuine issue as to any material facts with reference to any special or consequential damages the plaintiff has incurred by reason of extra cost incurred in locating and installing replacement equipment, loss of storage capacity and overhead expense resulting from the loss of use of the bins.

IT IS, THEREFORE, ORDERED that defendant's motion for partial summary judgment is hereby allowed as to special or consequential damages the plaintiff may have incurred by reason of extra cost incurred in locating and installing replacement equipment, loss of storage capacity and overhead expense resulting from the loss of use of the bins.

As a common carrier engaged in interstate commerce, defendant's liability for damage to cargo is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(1). *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 278, 264 S.E. 2d 774, 776, *disc. rev. denied*, 300 N.C. 556, ____ S.E. 2d ____ (1980); *see also Dublin Company v. Ryder Truck Lines, Inc.*, 417 F. 2d 777, 778 (5th Cir. 1969); *Neece v. Greyhound Lines*, 246 N.C. 547, 550, 99 S.E. 2d 756, 759 (1957). Under the Carmack Amendment the carrier is liable in the absence of a special contract for "the full actual loss, damage, or injury to such property." 49 U.S.C. § 20(11); *see S. Sorkin, Loss or Damage to Goods in Transit* § 11.02 (1979). This language has been construed as adopting the common law principles of damages. "Section 20(11) of the Interstate Commerce Act . . . codifies the common

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law rule that a carrier is liable for all damage sustained by goods in transit unless it can prove that the loss was due entirely to an excepted cause" *Masonite Corp. v. Norfolk & Western Ry. Co.*, 601 F.2d 724, 728 (4th Cir. 1979); *see also Tool Corp. v. Freight Carriers, Inc.*, 33 N.C. App. 241, 245, 234 S.E. 2d 758, 761 (1977). A carrier may limit its liability for negligent loss or damage to the property entrusted to it by special contract but unless specially pleaded by the carrier such contractual limitation is ineffective. *Clott v. Greyhound Lines*, 278 N.C. 378, 386, 180 S.E. 2d 102, 108 (1971); *see Leary v. Transit Company*, 22 N.C. App. 702, 706-7, 207 S.E. 2d 781, 785 (1974); 13 C.J.S. Carriers, § 252(c), at 527-28 (1939). In the case *sub judice*, defendant, having alleged no special contract, and having admitted liability, is liable for the full actual damage to the silos. Plaintiff argues that its damages should not be limited, however, to the full, actual damage to the silos, but should include additional damages for loss of use of the silos. We disagree. While in the case *sub judice* plaintiff properly alleged and established a *prima facie* case of negligence by showing delivery to defendant in good condition, and delivery by defendant to plaintiff in damaged condition, *Home Products Corp. v. Motor Freight, Inc.*, *supra*, at 278, 264 S.E. 2d at 776; *see also Clott v. Greyhound*, *supra*, at 388, 180 S.E. 2d at 110, and while under general principles of law, in a tort claim, special damages are recoverable if specifically pleaded, if proximately and naturally caused by defendant's tortious conduct, and if reasonably definite and certain, *Huff v. Thornton*, 287 N.C. 1, 8-9, 213 S.E. 2d 198, 204 (1975); *Trucking Co. v. Payne*, 233 N.C. 637, 639, 65 S.E. 2d 132, 133 (1951), we believe that the general principles of tort law do not apply here.

Sound public policy requires, as the law provides, that when goods are damaged while in transit by common carrier, the shipper is not put to the burden of showing either specific acts of negligence or where or how the damage occurred. *See S. Sorkin, supra*, § 5.02; *Home Products Corp. v. Motor Freight, Inc.*, *supra*. Sound public policy also requires that the liability of common carriers for such damage be limited to the loss of value of the property, as such value is determined under the general law of damages. While there is some case law to the contrary, we believe that the sounder view is that the wording of the Carmack Amendment restricts plaintiff's recovery to the damage to the property itself, and does not allow incidental, special or consequential damages, unless plaintiff shows that the contract of carriage itself imposes such liability or that actual notice of the possibility of

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the injury was given to the carrier. To allow special or consequential damages, in the absence of a special contract or actual notice to the carrier, would subject common carriers to unacceptable economic risk. This principle of limited liability was first enunciated in *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). In that case, mill operators were forced to close operations in order to ship a broken shaft for repairs. The carrier was not informed of the situation at the mill and negligently delayed shipment. The Court refused to award lost profits for the period of the delay holding that the damages recoverable for breach of contract were limited to those within the contemplation of the defendant at the time the contract was made.

While *Hadley v. Baxendale* involved a delay in shipment, hence an action grounded in breach of contract, we think the underlying public policy rationale of that decision extends to actions grounded upon the negligence of common carriers. We therefore hold that the *Hadley v. Baxendale* principle of limited liability applies to all actions against a common carrier for the loss of or injury to property in transit, whether such action is grounded in tort or contract. *R.R. v. Houtz*, 186 N.C. 46, 48, 118 S.E. 850, 851 (1923); *see also* 14 Am Jur. 2d, Carriers § 648, at 157-58 (1964); 13 C.J.S., Carriers § 267, at 619-20 (1939); *but see Marquette Cement Mfg. Co. v. Louisville & Nashville R. Co.*, 281 F.Supp. 944, 947 (E.D. Tenn., S.D. 1967), *affirmed*, 406 F.2d 731 (6th Cir. 1969). The trial court properly granted defendant's motion for partial summary judgment on the issue of special or consequential damages incurred by plaintiff.

[2] Plaintiff next assigns error to the trial court's formulation of the measure of general damages in the jury instructions. The trial court instructed the jury in pertinent part:

[T]he measure of damages for property injured or damaged by a carrier in the course of transportation such as the Southern Railway, in the course of transportation, is ordinarily the difference between its market value at its destination as it would have arrived but for the injury, and its market value in the condition in which it actually arrived less the unpaid freight.

....

Now, what is fair market value? The fair market value of any property is the amount which would be agreed upon as

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a fair price by an owner who wishes to sell but is not compelled to do so, and a buyer who wishes to sell [*sic*] but is not compelled to do so, and in this case, the Southern Railway kept the salvage and they owe the plaintiff very simply what the fair market of those two 12 by 40 foot silos is, and that's what you must determine in this case.

In arriving at that, you can consider what the plaintiff paid for the silos, the availability of the silos in the marketplace. You can consider the cost of repairing these silos. You can — and any other evidence that would reasonably reflect upon what the fair market value of these two silos is.

....

Plaintiff contends that the trial court erred in failing to instruct the jury as to the alternative measure of damages in the event the property had no market value, and in failing to instruct the jury that it could consider the cost of replacement in determining the fair market value. Plaintiff did not specially request such instructions. Normally the measure of damages for tortious injury to personal property is the difference between its fair market value immediately before and immediately after the injury. *Heath v. Mosley*, 286 N.C. 197, 199, 209 S.E. 2d 740, 741 (1974); *Simrel v. Meeler*, 238 N.C. 668, 670, 78 S.E. 2d 766, 768 (1953). In the context of goods injured by tortious acts of carriers, this measure of damages is ordinarily the difference between the market value of the property in the condition in which it should have arrived at its destination and its market value at destination in its damaged condition. *Farming Co. v. R.R.*, 189 N.C. 63, 68, 126 S.E. 167, 170 (1925); S. Sorkin, *supra*, § 11.03. The cost of repairs made necessary by the injury is properly considered by the jury when determining the fair market value. *Simrel v. Meeler*, *supra*, at 670, 78 S.E. 2d at 768; *see also Cooper Agency v. Marine Corp.*, 46 N.C. App. 248, 253, 264 S.E. 2d 768, 771 (1980). Although not a model of precision, we hold that the trial court's jury instruction adequately charged the jury on the ordinary measure of general damages and fully complied with G.S. 1A-1, Rule 51(a). Absent a special request by plaintiff to fully define or to elaborate the damages rule, the fact that the jury instructions included only the general rule for determining the damages is not grounds for reversal. *See Board of Transportation v. Rand*, 299 N.C. 476, 483-84, 263 S.E. 2d 565, 570-71 (1980); 22 Am. Jr. 2d, Damages § 346, at 449 (1965). "It is the duty of the party desiring instructions on a

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subordinate feature of the case or greater elaboration on a particular point to aptly tender request for special instructions.” *Hanks v. Insurance Co.*, 47 N.C. App. 393, 404, 267 S.E. 2d 409, 415 (1980). Plaintiff’s assignments of error concerning the jury instructions are overruled.

Plaintiff’s final assignments of error concern the trial court’s exclusion of certain evidence of the anticipated use and of the cost of repair or replacement. Any possible error in excluding this evidence was cured by the testimony of plaintiff’s first witness, Jay W. Munsell, a sales manager of the materials handling company that sold the silos to Zarn, who testified in detail about plaintiff’s intended use of the silos and about his company’s estimates of both the cost or repair of the damaged silos and the cost of new replacement silos. *Gibbs v. Light Co.*, 268 N.C. 186, 190, 150 S.E. 2d 207, 210 (1966); *accord*, *Eaves v. Cox*, 203 N.C. 173, 177-78, 165 S.E. 345, 347 (1932). Plaintiff’s final assignments of error are without merit.

No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

IN THE MATTER OF THE EDUCATION OF KATHRYN DIANNE LINDER v. WAKE COUNTY BOARD OF EDUCATION AND THE NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION AND ITS CHIEF ADMINISTRATIVE OFFICER, A. CRAIG PHILLIPS, INTERVENORS

No. 8010SC527

(Filed 20 January 1981)

Schools § 1— child with special educational needs — assignment to private school — responsibility for tuition — no standing of parents to raise issue

The parents of a child with special educational needs failed to establish that their child was about to be denied continuance in a program appropriate to her special needs within the meaning of G.S. 115-179.1 (a) and did not have standing to raise the issue of whether the Wake County Board of Education or the Department of Human Resources is responsible for tuition expenses of their child at a private school for handicapped children to which their child had been assigned by the Wake County School System.

APPEAL by respondent from *Canaday, Judge*. Judgment entered 22 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals on 4 December 1980.

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Kathryn Dianne Linder is a child with special needs within the meaning of G.S. 115-366. In May 1978, she was presented to the Wake County School System for enrollment for the 1978-79 school year. An individualized educational program was developed for her, recommending placement in the Frankie Lemmon Memorial Preschool (hereinafter Frankie Lemmon School). See G.S. 115-375. The Director of Special Programs for the Wake County Public School System, upon finding that the public schools did not have an appropriate program for Kathryn, elected to place her in the Frankie Lemmon School for 1978-79. See G.S. 115-367.

Frankie Lemmon School is a private non-profit corporation supported in part by State funds from the Wake Area Mental Health Center and the Department of Human Resources. The preschool is also considered an agency of the Department of Human Resources for the purpose of offering programs to handicapped children. In this capacity, it is eligible to receive, and did receive for the 1978-79 school year, federal funds for the handicapped pursuant to Pub. L. No. 89-313, 20 U.S.C. § 241 c (a) (5) (1970) [current version at 20 U.S.C. § 2771 (Supp. 1978)]. For the purpose of securing funds and services for handicapped children under the Pub. L. No. 89-313 program, the Department of Human Resources and the Frankie Lemmon School certified in October 1978 that Frankie Lemmon School was a state-supported school and that the Department of Human Resources had direct responsibility for providing a free public education to the handicapped children reported in the annual survey of average daily attendance of handicapped children in schools operated or supported by state agencies. Kathryn Dianne Linder was one of the children counted by Frankie Lemmon School in the annual survey for funding through the Pub. L. No. 89-313 program during the 1978-79 school year.

[3] With regard to the 1960 judgment creating a canal corporation, the evidence presented at trial was insufficient to justify a directed verdict in defendant's favor on this ground. The only evidence at trial relating to the canal corporation was that a judgment had been entered

The Wake County Board of Education appears to be the "local educational agency" charged with providing Kathryn Dianne Linder with a free appropriate special education under G.S. 115-367 (i). The Wake County School System provided at its own expense transportation and speech therapy services for the child, but refused to pay her tuition on the grounds that, since the Department of Human Resources receives the Pub. L. No. 89-313 funds attributable to Kathryn Dianne Linder on the basis of their direct responsibility for her education, that education should be paid for out of those Pub. L. No. 89-313 funds.

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The Frankie Lemmon School faced serious financial difficulties in 1978 and it was feared that the school would go bankrupt. The Linders requested a due process hearing pursuant to G.S. 115-179.1 to review the Wake County School Board's decision not to pay Frankie Lemmon School for Kathryn's tuition.

After a hearing before a local hearing officer at which the foregoing undisputed facts were brought out, a decision was rendered that as between the Wake County School Board and the Linders, the School Board was obligated to pay Kathryn's tuition.

The School Board appealed this decision. The hearing officer for the State Superintendent of Public Instruction reversed the decision of the local hearing officer, dismissing the case on the ground that the Linders lacked standing to complain about the funding of their daughter's education and that the question of funding was beyond the scope of the due process hearing provided in G.S. 115-179.1.

The Linders appealed the case to the Superior Court pursuant to G.S. 115-179.1 (g) where the State reviewing officer's decision was reversed and judgment was entered requiring Wake County School Board to pay Kathryn Linder's tuition for the 1978-79 school year.

Attorney General Edmisten by Assistant Attorney General Kaye R. Webb for the North Carolina Department of Public Instruction; and Tharrington, Smith & Hargrove by George T. Rogister, Jr., for the Wake County Board of Education, respondent appellants.

Johnson, Gamble & Shearon by David R. Shearon for petitioner appellees.

CLARK, Judge.

This Court reverses the judgment of the Superior Court and remands this case for dismissal. No judgment should have been entered in this case for the reason that the petitioners in the original hearing, the parents of Kathryn Dianne Linder, lacked standing.

The Linders clearly have no stake in the funds themselves. Even if no governmental entity ever provided necessary funds, the parents of a special child such as Kathryn could never, under present law, be charged with the expenses of providing that child with an appropriate education. G.S. 115-363 and -364. Whether the Linders win or lose this case, then, their economic situation will not change. They will receive

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no funds; they will pay out no funds. They argue, however, that the issue in which they have a justiciable interest is not who pays the money, but whether their daughter continues to receive the "free appropriate publicly supported education" to which she is entitled. G.S. 115-363. They argue that their daughter will be denied an appropriate education unless the issue of who pays for it is resolved.

The parents claim standing to raise the issue of what governmental entity is responsible to the Frankie Lemmon School for their daughter's education expenses by virtue of G.S. 115-179.1 (a), which provides for review "of an . . . omission by State or local authorities on the ground that the child . . . is about to be: (1) Denied . . . continuance in a program appropriate to his condition and needs" They argue that Frankie Lemmon School is the only school in the area equipped to provide their child with the appropriate education that is her right, G.S. 115-363 and -364, and further that the school might be forced to close its doors if it does not receive funds from either the Wake County Board of Education or the State Department of Human Resources. They contend that this statute confers on them standing to appeal the decision of the Wake County School Board not to pay the Frankie Lemmon School for their daughter's education because the decision threatens their daughter's continuance in the Frankie Lemmon School. We disagree.

The statute under which the Linders claim standing provides clear guidelines for notice to parents of any impending denial of a program appropriate to their child's special educational needs. G.S. 115-179.1 (b). The Linders did not allege receipt of such notice, and they admitted at the oral arguments on this case that their child had in fact received her free and appropriate education in the Frankie Lemmon School, both in the school year in which this action was commenced and in the two school years since its commencement.

The same statute which establishes the responsibility of the State to provide "special education and related services appropriate to all children with special needs," also provides that the responsible governmental unit must develop and administer an appropriate program only if the same service is not being provided by existing facilities. G.S. 115-367 (a). This provision seeks only to avoid useless duplication of programs, and in no way relieves the State of its responsibility for Kathryn Linder's education. Since the Frankie Lemmon School offered a program appropriate to Kathryn Linder's needs, it would be

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useless duplication for either Wake County or the State Department of Human Resources to develop an identical program of its own. If, however, the Frankie Lemmon School closed its doors, one of these entities would be statutorily required to provide to Kathryn Linder the education she now receives from the Frankie Lemmon School. We think that only if no such program were then developed would Kathryn Linder actually be denied her free and appropriate education. We believe further that, since the Frankie Lemmon School has at all times in the past and is currently providing Kathryn with an appropriate education, any decision by us of which State agency might be required to develop such a program would be premature and in the nature of an advisory opinion.

The Linders' claims of standing are all based on the erroneous premise that if the Frankie Lemmon School closes its doors, it will be impossible for the State to provide their daughter with an appropriate education. We believe that Kathryn Linder's right is to a free and appropriate education, and not necessarily to an education at the Frankie Lemmon School. The continuance of the Frankie Lemmon School is irrelevant to the continuance of Kathryn Linder's appropriate education in light of the mandate of G.S. 115-367 (a) that the responsible governmental entity directly provide an appropriate program if no private agency offers such program. The unavailability of an appropriate education elsewhere in Wake County is a direct consequence of its availability through the Frankie Lemmon School. The Linders have advanced no basis for believing that the State would have failed to follow the mandate of G.S. 115-367 (a) if no private agency capable of providing the required services existed, and thus have failed to establish that their child was about to be denied continuance in a program appropriate to her special needs under G.S. 115-179.1 (a).

We note in closing that any review by us of the merits of the Linders' claim is rendered moot by the admission of the parties at the oral arguments on this matter that the educational expenses of Kathryn Dianne Linder for the 1978-79 school year have since been paid at no cost to the parents.

The judgment is reversed and the case remanded to the Superior Court for dismissal.

Judges HEDRICK and WHICHARD concur.

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STATE OF NORTH CAROLINA v. BOBBY GEORGE LANIER

No. 8022SC687

(Filed 20 January 1981)

Burglary and Unlawful Breakings § 5.1; Criminal Law § 44— actions of bloodhound — testimony inadmissible — insufficiency of evidence

In a prosecution of defendant for breaking or entering, evidence relating to the actions of a bloodhound should have been excluded because the State failed to show that the dog was put on the trail of the guilty party under such circumstances as to afford substantial assurance that the person trailed was in fact the person suspected, and the case should have been dismissed for insufficiency of evidence where the evidence tended to show that one and a half to two hours after a breaking occurred, one and a half to two miles away, defendant was found on a little sandbar by a creek; there was no evidence tending to establish that defendant was ever at the residence broken into; the only witness to the crime was unable to identify the man he had seen leaving the residence; there was no evidence defendant was at the place at which the dog was released to track the thieves; there was no evidence placing stolen guns or other stolen items in defendant's possession; there was evidence of footprints in the vicinity of the residence, but no evidence indicating they were defendant's footprints; and there was no evidence that defendant attempted to flee to avoid capture.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 12 March 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 2 December 1980.

Defendant was charged in a proper bill of indictment with breaking and entering, larceny and receiving.

The State's evidence, in summary, was as follows:

George Bates, a neighbor whose house was "about one hundred feet" from that of Roy Hartman, the victim of the alleged offense, testified that on 30 September 1979 he saw a masked man run to Hartman's back door and go down a stairway. A few seconds later a smaller man did the same. It "was about 10:00 o'clock in the morning" when he first saw these two men. Bates heard glass break in the door. He then saw one of the two men "come out the back door with two guns," and he "asked him to hold it right there." The man then "hollered at the one inside the house and started running." The other man "ran out and ran around the house where [Bates] could not see him." The first man "had on a mask," and the second had what "looked like a stocking over his head." Bates "was not able to recognize the two men at [his] neighbor's house." He "could not tell any-

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thing else about them such as race or anything of that nature." Bates testified:

The closest I ever got to the two men I saw coming out of the house was about a hundred feet. I could not recognize who they were, nor could I see the color of their hair. One was a little heavier than the other; he had on the ski mask. The other one had a stocking over his head. Both were built kind of husky.

The final question to Bates on cross examination, and his answer, were:

Q. The fact of the matter is you can't say you saw Mr. Lanier (the defendant) come out of the house?

A. No, I couldn't see his face, that's what I recognize a man by is his face.

Roy Hartman, the owner of the home which was broken into, testified that he returned home from church on 30 September 1979 and found that his basement door and the wall between the stairsteps were torn down. His belongings were scattered about the house and certain items including a .22 rifle and a .12 gauge shotgun were missing. He did not know the defendant, Bobby George Lanier, and he had not given the defendant or anyone else permission to enter his home that morning and remove anything.

Paul Lanier, an employee of the North Carolina Department of Corrections, testified on direct examination that his duties with the Department included "running escapees when they escape from prison, bank robbers, anything like that with bloodhounds." He had performed these duties "for about twelve years." On the morning of 30 September 1979 at a time he could not recall he had brought a registered bloodhound with him to the Hartman residence. He had "worked with that particular dog three or four years."

Lanier then testified on *voir dire* that he had trained this dog himself; that she was "pure blood" and was "from the dog from Hee Haw, Boraguard (sic);" that he had worked with the dog's father and mother in tracking prisoners, and this dog had "caught prisoners before;" and that he was "not an expert at dog pedigrees."

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He further testified on *voir dire* that when he arrived with the dog at the Hartman residence on 30 September 1979, "one of the deputies . . . said two fellows had run out of the back of the house." He had "put the dog around at the back of the house and run a track . . . east of the Hartman house where [he] lost the track." He then took the dog back to the house where he "started north away from the house, running another track for approximately a mile and a half or two miles." He "then went east and north; then west and [found] the defendant [who] was beside a creek that runs behind the Hartman's house out in the woods." The defendant "had on a pair of shoes and a pair of pants, but that's all he had on." Lanier testified: "The dog was following a track from the time I put him on that track until the time I found [the defendant]. It was around noon when I ran upon [the defendant]."

The trial court overruled defendant's objections to Lanier's testimony, and he then testified on direct examination that "[t]his bloodhound was bred for tracking human beings;" that it was "approximately four years old," and he had trained it "from a puppy;" and that it "had been used successfully to track human beings on more than one occasion prior to September 30, 1979." He then reiterated before the jury his *voir dire* testimony about having "put the dog on the track," having lost one track, and ultimately while pursuing a second track having found the defendant "on a little sandbar, where some water comes into the main creek." He testified that he "observed human footprints," but he did not at anytime link the footprints to the defendant. He also testified that the defendant "did not have anything with him at the time [he] found him."

On cross examination Lanier testified that when a dog he trains "gets on track," it is "supposed to" and "usually does" stay on the track of the "particular person or thing;" that when a prisoner escapes and "we put the dog in on that track, most of the time that is who we catch, the prisoner that run;" but that "sometimes we run across a hunter [and] that dog will run that track a little way," and that the dog "wouldn't stay on [the scent or track] everytime." He stated that on this occasion he "started tracking . . . somewhere after 10:00 o'clock . . . in the morning" and "caught [defendant] around dinner;" that he ran "a pretty good while before [he] caught anybody;" and that he "started sometime after 10:00 o'clock [and] it was about 12:00 when [he] caught him." He imagined he "was running that dog approximately an hour

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and a half." When he first saw defendant, defendant "wasn't trying to get away from [him]."

Greg Kirkman, a detective with the Davidson County Sheriff's Department, testified that he arrived at the Hartman home at approximately 12:30 on 30 September 1979; that he went to the edge of the back yard and "started down a slight grade approximately one hundred feet;" that he found a barbed wire fence that was down; and that he found two weapons "on the far side of the fence from the house," "a .22 rifle and a .12 gauge shotgun." He "took the weapons back to the house where Mr. Hartman identified them" (presumably as the weapons Hartman had testified were missing from his house).

Defendant offered no evidence. The trial court denied defendant's motion to dismiss, and the jury returned a verdict of guilty of felonious breaking or entering and larceny.

From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Leonard and Snyder, by James E. Snyder, Jr., for defendant appellant.

WHICHARD, Judge.

Defendant contends the trial court erred in admitting the testimony of the State's witness as to the actions of the bloodhound and in refusing to grant his motion to dismiss for insufficiency of the evidence. We agree with both contentions.

In *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929), our Supreme Court, per Chief Justice Stacy, set forth the rule on admission of evidence regarding actions of bloodhounds as follows:

It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the

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trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

This rule has been quoted with approval in recent opinions of the Supreme Court. *See State v. Irick*, 291 N.C. 480, 495-497, 231 S.E.2d 833, 843-844 (1977); *State v. Rowland*, 263 N.C. 353, 358-361, 139 S.E.2d 661, 665-666 (1965).

We do not consider whether the evidence here met the first three *McLeod* requirements, for we find that it clearly failed to meet the fourth requirement. For bloodhound evidence "[t]o be considered by the jury, it is necessary for the State to show that the dog was put on the trail of the guilty party under such circumstances as to afford substantial assurance that the person trailed was, in fact, the person suspected." *State v. Marze*, 22 N.C.App. 628, 630; 207 S.E.2d 359, 361 (1974). Nothing in this record tends to establish that the defendant was ever at the Hartman residence. The witness Bates testified that he saw two men at the residence, but he was unable to identify them. There was no evidence whatsoever that the defendant was at the place from which the dog was released to track the thieves. There was evidence that a .22 rifle and a .12 gauge shotgun were missing from the Hartman residence, and that they were found "on the far side of the fence from the house;" but there was no evidence whatsoever placing them or other stolen items in defendant's possession or placing defendant closer than "about a mile and a half or two miles" from where they were located. There was evidence of footprints being found in the vicinity of the Hartman residence, but no evidence whatsoever indicating they were defendant's footprints. There was no evidence whatsoever that defendant was fleeing to avoid capture.

The evidence tending to "afford substantial assurance . . . of identification" in *McLeod* was considerably greater than that here; yet, the Supreme Court in *McLeod* held that it should have been excluded. *A fortiori*, the evidence here should have been excluded. Likewise, there was considerably more evidence in *Marze* than here tending to identify the defendant and to point to his guilt; yet, this Court considered that evidence insufficient to go to the jury. *A fortiori*, the evidence here was insufficient to go to the jury.

The sum of the evidence against this defendant is that one and one-half to two hours after a breaking occurred one and one-half to two

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miles away, he was found on a "little sandbar" by a creek watching the rippling of the brook on a Sunday afternoon. If this constitutes criminal conduct, the author of this opinion pleads guilty to repeated offenses; and he only regrets the infrequency of their occurrence. Further, this may be the type of case Shakespeare had in mind when he wrote:

The jury, passing on the
prisoner's life,
May in the sworn twelve
have a thief or two
Guiltier than him they try.¹

The evidence relating to the actions of the bloodhound should have been excluded for its failure "to afford substantial assurance or permit a reasonable inference, of identification" as required by *McLeod*. 196 N.C. at 545, 146 S.E. at 411. Without this testimony, the record is devoid of any evidence which even raises "a suspicion or conjecture" as to defendant's guilt, and certainly does not contain the "substantial evidence of all material elements of the offense [necessary] to withstand the motion to dismiss." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956). See also *State v. Smith*, 40 N.C. App. 72, 252 S.E.2d 535 (1979).

The judgment is therefore vacated and the cause remanded to the superior court for entry of judgment of dismissal.

Vacated and remanded.

Judges HEDRICK and CLARK concur.

¹ W. Shakespeare, *Measure for Measure*, Act II, Scene 1, line 19.

Employment Security Comm. v. Wells

IN THE MATTER OF: EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT v. STEVE WELLS, APPELLEE

No. 8010SC433

(Filed 20 January 1981)

State § 12— dismissal of State employee — notice of reasons

The Employment Security Commission failed to give respondent proper notice of the reasons for his dismissal as an employee as required by G.S. 126-35 where the only information given respondent concerning the reasons for his dismissal was contained in the letter of dismissal which stated that respondent violated agency procedure in attempting to recruit migrant workers from Florida by phone and personal visit, respondent had required growers to use crew leaders even though workers were not a part of a crew, respondent had forced workers to work for a designated crew leader even though the workers preferred not to work in a crew, and respondent violated agency procedure by not reporting illegal aliens, since the letter did not describe any incidents with sufficient particularity so that respondent could know precisely what acts or omissions were the basis of his discharge.

APPEAL by petitioner from *Herring, Judge*. Judgment entered 4 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 4 November 1980.

Respondent, Steve Wells, was formerly employed by petitioner, the Employment Security Commission, as a Rural Manpower Representative I at the Burlington local office. Respondent's duties in this position were connected with administering federal and state law and regulations concerning migrant workers.

On 2 November 1977, petitioner suspended respondent from his job without pay pending an investigation into allegations that respondent has violated laws and petitioner's policies in the performance of his duties.

On 26 January 1978, petitioner through its chairman, Manfred Emmrich, offered respondent reinstatement to a different job site without back pay until the investigation was completed and a decision reached on respondent's job status. Respondent did not accept the offer of reinstatement.

On 3 May 1978, respondent requested from John Fleming, director of petitioner's employment security division, the identity of the persons who had made allegations against him, but Mr. Fleming did not furnish respondent with this information.

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Petitioner dismissed respondent from his job by letter dated 9 June 1978. The dismissal was effective as of 2 November 1977. The following reasons for dismissal were contained in petitioner's letter.

1. Violated Agency Procedure in attempting to recruit workers from Florida by phone and personal visit.
2. Required growers to use crew leaders even though workers were not a part of a crew nor did the crew leader provide any service for his fee.
3. Forced workers to work for designated crew leader even though the workers preferred not to work in a crew. Workers who questioned assignment to a crew were threatened with loss of job or deportation.
4. Violated Agency Procedure by not reporting illegal aliens.

Petitioner did not inform respondent of his rights of appeal.

On 19 June 1978, respondent appealed his dismissal to the State Personnel Commission. Prior to this appeal, respondent had requested from petitioner specific details concerning the four reasons for his dismissal. On 6 July 1978, petitioner replied to respondent's request for specific information saying that its 9 June 1978 letter of dismissal constituted a detailed account of the wrongdoings as required by the State Personnel Act and the State Personnel Manual. Respondent's request for a copy of the SBI report of the investigation made of him was denied. The SBI refused to furnish the report without a court order. Petitioner supplied respondent with no further information.

On 8 and 11 December 1978, and 21 March 1979, the State Personnel Commission held hearings on respondent's dismissal. The issues on appeal were whether petitioner had just cause to dismiss respondent, and whether petitioner complied with State law and personnel policy in effecting the dismissal. At the end of the presentation of petitioner's evidence, and on respondent's motion, the hearing officer entered an order finding that petitioner had not carried its burden of proof, and making recommendations for a decision in favor of respondent.

Petitioner excepted to the findings of fact, conclusions and recommendations of the hearing officer. The matter was heard by the full

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the full State Personnel Commission on 18 May 1979. Its "Decision and Order" was issued 21 May 1979, adopting the findings of fact and conclusions of the hearing officer. It ordered its own remedies. Specifically, it adopted the granting of respondent's motion to dismiss due to petitioner's failure to carry the burden of proof necessary to show just cause for a dismissal. The Commission ordered, among other things, that petitioner offer respondent the option of being reinstated to the same position in another location, or reinstate respondent in a position of comparable responsibility at his former salary in the same local office.

Petitioner petitioned the superior court for review of the decision and order of the commission. The matter was heard by the superior court on 28 January 1980. The judgment of the superior court held that the findings of fact and decision of the State Personnel Commission were supported by competent, material and substantial evidence and affirmed the commission's decision. Petitioner appealed from that judgment.

Howard G. Doyle and V. Henry Gransee, Jr., for the Employment Security Commission of North Carolina, petitioner appellant.

Latham, Wood and Balog, by James F. Latham, for respondent appellee.

MORRIS, Chief Judge.

We need not reach the question of whether respondent failed to carry the necessary burden of proof to show just cause for petitioner's dismissal from its employ. Rather, we decide this case on the preliminary question of whether petitioner had given respondent the proper notice of the reasons for his dismissal as required by law. G.S. 126-35 provides in part:

No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. *In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.* The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the depart-

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ment. A copy of the written statement given the employee and the employee's appeal shall be filed by the department with the State Personnel Director within five days of their delivery (Emphasis added.)

As a permanent employee of the State, respondent was entitled to the safeguards provided by this statute.

In a recent case, this Court construed the constitutionality and effects of G.S. 126-35. Judge Martin, Harry C., stated with respect thereto:

N.C.G.S. 126-35 establishes a condition precedent that the employer must fulfill before disciplinary action against an employee may be taken. *See Jones v. Department of Human Resources*, 300 N.C. 687, 268 S.E. 2d 500 (1980). The employer must furnish the employee with a written statement containing the specific acts or reasons for the disciplinary action and the employee's appeal rights.

In *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548 (1972), the Supreme Court of the United States established that a statute such as N.C.G.S. 126-35 creates an interest in continued employment that is safeguarded by due process under the Fourteenth Amendment of the United States Constitution. This interest arises from the act of the legislature and not from the contract of employment. *See also Faulkner v. North Carolina Dept. of Corrections*, 428 F. Supp. 100 (1977).

The purpose of the statute is to notify the employee of the reasons for the disciplinary action and to advise him of his rights to appeal the disciplinary action

Luck v. Employment Security Comm., 50 N.C. App. 192, 194, 272 S.E. 2d 607, 608 (1980).

In this instance, the only information given the respondent concerning the reasons for his dismissal was contained in petitioner's letter of dismissal. The letter dated 9 June 1978 gave only the following reasons for respondent's dismissal.

1. Violated Agency Procedure in attempting to recruit workers from Florida by phone and personal visit.

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2. Required growers to use crew leaders even though workers were not a part of a crew nor did the crew leader provide any service for his fee.
3. Forced workers to work for designated crew leader even though the workers preferred not to work in a crew. Workers who questioned assignment to a crew were threatened with loss of job or deportation.
4. Violated Agency Procedure by not reporting illegal aliens.

When petitioner appealed his dismissal, he requested specific details regarding the four reasons for the dismissal. He asked for dates and the names of the individuals involved in these incidents. Apparently, he never received any of this information.

The notice, such as it was, was not given *prior* to the disciplinary action as required by G.S. 126-35, but it was given simultaneously with the action in petitioner's letter of dismissal.

G.S. 126-35 imposes an affirmative duty on State agencies to inform discharged employees, in writing, of the "specific acts or omissions" that were the reasons for the disciplinary action. "Specific acts or omissions" implies that these incidents should be described with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. There was no specificity in any of the four charges lodged against defendant. There were no names, no dates, and no locations supplied. There was no way for respondent to locate these alleged violations in time or place, or to connect them with any person or group of persons. Furthermore, petitioner refused to correct the deficiency in its information by declining to furnish respondent with any further information upon respondent's request following the dismissal.

To require no more specificity in the notice than was given in this case would render the statute useless. An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation. Respondent could do neither of these without more information than was supplied by petitioner in this case.

In accordance with our decision that respondent was not given the proper statutory notice of the reasons for his dismissal, we remand

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this case to the superior court with instructions that it remand the matter to the State Personnel Commission with instructions that it dismiss the action due to the lack of proper notice, and that it render respondent a remedy in accord with that dismissal.

Judges WEBB and MARTIN (Harry C.) concur.

JOAN G. HARPER v. CHARLES W. HARPER

No. 8010DC479

(Filed 20 January 1981)

Divorce and Alimony §§ 24, 25— child custody and support — failure of complaint to state claim

Where a husband and wife are living together and the children are in their joint custody and are being adequately supported by the supporting spouse, in the absence of allegations which would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support; therefore, the trial court erred in denying defendant's motion to dismiss on the ground the complaint failed to state a claim upon which relief could be granted, since the complaint attempted to assert, and the court allowed, what appeared to be a "no fault" divorce from bed and board, and such an action does not lie in this State.

APPEAL by defendant from *Parker (John H.)*, Judge. Order entered 28 December 1979 in District Court, WAKE County. Heard in the Court of Appeals 12 November 1980.

The appeal is from an order relating to child custody, child support and attorney fees in plaintiff's favor.

On 30 November 1979, plaintiff filed a complaint and affidavit setting out the following. She and defendant are married and live together on Kilkenny Place in Raleigh, North Carolina. Their four children live with them. The names and ages of the children are as follows: Joel Kenneth Harper, age 17, Alison Joan Harper, age 16, Erin Suzann Harper, age 10 and Mark Goodsell Harper, age 3.

Plaintiff alleges that the parties are not happy and that it is in the best interest of the parties and the children that they separate. She does not allege any misconduct on the part of her husband towards either her or the children. She does not allege that her husband ever failed to provide adequate support for his family. She, in effect, asked

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the court to require defendant to separate himself from plaintiff and the children, move out of his home, award her custody of the children, provide shelter for herself and the children and give her an automobile. She also asked that she be paid a fixed sum for child support and counsel fees.

On 6 December 1979, defendant moved the court to dismiss the action on the grounds that plaintiff's complaint fails to state a claim upon which relief can be granted. The failure to state a claim was again alleged in defendant's answer filed on 14 December. Defendant denied the allegations that the parties were not happy living together and that it would be in the best interest of the parties and the children to separate. Defendant alleged that he had been a "faithful and dutiful husband and contributed his time, energies and financial resources toward making a happy home life for plaintiff and the children of their marriage" and that he "has provided and desires to continue to provide the love, companionship and society to plaintiff and the children of their marriage." He alleged that the best interest and welfare of the children is for plaintiff and defendant to continue to live together as husband and wife, jointly exercising parental custody and control over said children.

A hearing was held on 17 December 1979. On 28 December 1979, an order was entered requiring, among other things, the following:

1. Plaintiff is hereby awarded the primary custody of Joel Kenneth Harper, Alison Joan Harper, Erin Suzann Harper and Mark Goodsell Harper, and the right to control and supervise the upbringing of said children during their minority.

2. Defendant is hereby awarded secondary custody of the minor children for the purpose of visitation according to the following terms and conditions:

(a) Joel Kenneth Harper, Alison Joan Harper and Erin Suzann Harper are of sufficient age that defendant's visitations may be arranged directly with each of them. However, the arrangements for visitation between defendant and those children shall, insofar as possible, be made in advance by telephone.

(b) Defendant's visitation with Mark Goodsell Harper shall be at the following times unless plaintiff agrees otherwise:

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(i) Every other weekend from Friday at 6:00 o'clock p.m. until Sunday at 6:00 o'clock p.m.

(ii) Easter in each even year.

(iii) Thanksgiving in each odd year.

(iv) December 25 at 2:00 o'clock p.m. until December 27 at 6:00 o'clock p.m. in every year.

(v) Up to four weeks each summer.

(c) Defendant shall avoid coming upon the premises occupied by plaintiff and the children without plaintiff's consent and invitation obtained in advance except for the purpose of exercising a predetermined visitation. In exercising his visitations defendant shall not enter plaintiff's home but shall receive and return the children to the front entrance.

3. In the event of conflict between plaintiff and defendant concerning decisions affecting the best welfare of the children, plaintiff's decision shall control.

4. Plaintiff is hereby awarded sole and exclusive possession of the family home located at 4817 Kilkenny Place, Raleigh, North Carolina, rent free, until all of the children of the parties have reached the age of majority or are otherwise emancipated. Defendant shall not directly or indirectly disturb or in any manner interfere with or interrupt plaintiff's possession or right to possession or bring any action to partition the property or to sell the same in lieu of partition. Defendant shall vacate the premises and surrender sole possession to plaintiff on or before December 28, 1979.

5. Plaintiff is hereby awarded sole possession and ownership of the household furnishings located in the residence at 4817 Kilkenny Place, Raleigh, North Carolina, in order to provide a suitable home for the children. However, defendant may remove such basic necessities and items of furniture from the home as may be agreeable between the parties. In the event the parties are unable to agree upon the items to be removed by defendant, either party may apply to the Court for a determination of such items.

6. Defendant shall provide the following support for the children:

(a) Defendant shall promptly pay when due all mortgage payments, *ad valorem* taxes and insurance pre-

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miums upon the home located at 4817 Kilkenny Place, Raleigh, North Carolina until all of the children of the parties have reached the age of eighteen years or are otherwise emancipated. He shall thereby benefit from the income tax deductions relating to his payment of interest and local property taxes.

(b) Defendant shall also pay plaintiff the sum of \$75.00 per month for each minor child of the parties until the child reaches the age of eighteen years or is otherwise sooner emancipated.

(c) Within ten days from the date hereof defendant shall transfer to plaintiff title and ownership of the family automobile customarily operated by her.

(d) Defendant shall maintain and keep in force a policy of medical and hospital insurance equivalent to the coverage now maintained by him which shall provide benefits to each child of the parties during the child's minority.

(e) So long as defendant remains obligated for the support of any child hereunder, he shall also pay all of the child's hospital, medical, dental and prescription drug expenses which are not paid by insurance.

(f) Within ten days from the date hereof defendant shall pay plaintiff a lump sum for child support in the amount of \$1,500.00.

7. Within five days from the date of this Order defendant shall pay the sum of \$500.00 to plaintiff's counsel, J. Harold Tharrington, Attorney at Law, 300 BB&T Building, Raleigh, North Carolina.

Defendant appealed.

Tharrington, Smith and Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for plaintiff appellee.

Harrell and Titus, by Richard C. Titus and Bernard A. Harrell, for defendant appellant.

VAUGHN, Judge.

Defendant's motion to dismiss should have been allowed because the complaint fails to state a claim upon which relief can be granted.

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The complaint appears to attempt to assert, and the court allowed, what appears to be for most practical purposes, a “no fault” divorce from bed and board. Such an action does not lie in this State.

Where, as here, husband and wife are living together, the children being in their joint custody and being adequately supported by the supporting spouse, in the absence of allegations that would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children and obtain an order for child support.

Even if the wife and children had been living separate from the husband and there was a justiciable controversy as to custody and support, we have not been referred to any authority that would authorize the judge to evict defendant from his home and assign it to his wife for her use and that of the children, in the absence of allegations and proof of matters that would also support an award of alimony or divorce. The pertinent statute concerning the payment of *child support* is as follows:

Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a *security interest in real property*, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony *pendente lite* is also ordered, the order shall separately state and identify each allowance.

G.S. 50-13.4(e) (emphasis added).

Where, however, an order for *alimony* is authorized, the following statute controls:

Alimony or alimony *pendente lite* shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or *possession of real property*, as the court may order. In every case in which either alimony or alimony *pendente lite* is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

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G.S. 50-16.7(a) (emphasis added).

Even if the pleadings should be said to be amended to conform to the evidence, plaintiff has still failed to make out a claim against defendant. Plaintiff testified in her own behalf and called defendant as her own witness. No other evidence was offered except an affidavit as to plaintiff's needs which she admitted was so excessive as to be "silly." All of the evidence indicates that the children are happy and well adjusted in their home and community. They appear to lead active and wholesome lives. Both parents can obviously take pride in all of them. Plaintiff testified that she has a Bachelor of Science degree in home economics but, other than teaching school for a few months and working as a secretary for a few months, she has never worked outside the home. She has, from time to time, taught piano in her home particularly when she was instructing one of her own children in that art. Recently, she has invested in a diet counselling franchise. Clients come into the family home for a few hours in the morning. For the most part of the last eighteen years, however, she has spent her time carrying out the usual responsibilities of a mother and wife who does not have to work in outside employment. At the hearing, plaintiff related her activities in considerable detail. They add up, however, to the normal activities of a good homemaker. She ran the household, and ran it well, while her husband developed a career to obtain, among other things, the financial resources to provide his family with a standard of living far above the average.

Page after page of the record is filled with inadmissible speculation and hearsay that was apparently admitted without objection. Most of it is devoted to plaintiff's attempts to articulate rather amateurish and abstract notions of faulty interpersonal relationships and behavioral patterns - a field best left to those physicians trained in psychiatry who, notwithstanding their scientific knowledge, find much about which they disagree. This is but another field where a little learning often does more harm than good.

A commonsense appraisal of plaintiff's case is as follows. After 18 years, she has tired of her marriage to defendant and, in her words, "wants out." She admits that, although she does not dislike her husband, she does not love him and says that she does not know when she last loved him. She had been trying to get him to move out of his home for a long time before she started this suit. She admits that "[t]he children all have a great deal of affection for their father. In fact,

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they all love him very much. The real root of the problem is that I don't love him." Her husband is a university professor and a colonel in the Air Force Reserves. He has provided well for his family, including the 4 bedroom, \$80,000.00 house in which they live. In sum, there is nothing in the evidence that would have given rise to a claim in her favor for alimony or divorce, and plaintiff does not contend that there is. There were differences of opinion as there undoubtedly are in every marriage. He has criticized her, and she has criticized him. He was too generous with his children, both materially and in open manifestation of his affection for them, in her opinion. He was overly concerned with their physical safety, in her opinion. He thought their 11-year-old daughter was too young to baby-sit, and she disagreed. She also did not approve of some of his religious leanings. She thought his ego needed building up because his "self-esteem has not been what it should have been." She on the other hand describes herself as "a strong independent person."

In summary, plaintiff, without cause or excuse, wants out of the marriage but not out of the marital home. The law cannot require her to live with her husband, but it will not allow her to evict him. Plaintiff's actions tend to amount to constructive abandonment of defendant and might well entitle him to a divorce from bed and board.

We have decided this case on grounds that were not bases of assignments of error or suggested in defendant's brief as required by the Rules of Appellate Procedure. We do this within the clear residual power of an appellate court, as well as that recited in App. R. 2, in order to prevent a manifest injustice to a party.

The order from which defendant appealed is reversed, and the case is remanded for an order dismissing the action.

Reversed and Remanded.

Judges MARTIN (Robert M.) and WELLS concur.

Pigott v. City of Wilmington

SHELDON PIGOTT AND WIFE, JANICE PIGOTT v. THE CITY OF WILMINGTON AND
A. HAYWOOD ROWAN, CHIEF BLDG. INSPECTOR FOR THE CITY OF WILMINGTON

No. 805DC421

(Filed 20 January 1981)

Public Officers §§ 1, 9; State § 4.1—building inspector — public official — no liability for simple negligence

The chief building inspector of the City of Wilmington was a "public official" of the City, and he was engaged in the performance of governmental duties involving the exercise of judgment and discretion in determining whether plaintiffs' greenhouses were constructed in compliance with the applicable law. Therefore, the building inspector could not be liable to plaintiffs in an action based on his inspection of plaintiffs' greenhouses where there was neither sufficient allegation nor forecast of evidence that the inspector acted maliciously or corruptly or that he acted outside of and beyond the scope of his duties, and summary judgment dismissing the action as to him was proper.

APPEAL by plaintiffs from *Carter Lambeth, Judge*. Judgment entered 20 November 1979 in District Court, NEW HANOVER County. Heard in the Court of Appeals 16 October 1980.

Plaintiffs seek damages in the sum of \$8,000.00 from the City of Wilmington and its Chief Building Inspector, A. Haywood Rowan (hereinafter Rowan), on account of the alleged negligent conduct of Rowan. In their complaint plaintiffs alleged the following:

On or about 1 September 1977 plaintiffs had two (2) small greenhouses constructed on property which they owned in the city of Wilmington. On or about 10 May 1978 Rowan informed them that they had failed to obtain the necessary building permits for the construction of the greenhouses, and that "the greenhouses did not meet necessary building codes." Rowan further informed them that the greenhouses "would have to be brought up to code within 10 days or removed within 30 days." Plaintiffs requested and received an additional 30 day period in which to comply with Rowan's demand; and at his demand they then demolished the greenhouses, "resulting in a loss to themselves of approximately . . . \$8,000.00."

After the greenhouses had been demolished, Rowan informed plaintiffs that if the greenhouses were less than 400 square feet in area, "they could be built using any type construction and no permit was required." One of the greenhouses was 216 square feet in area, and the other was 448 square feet. Thus, one was not covered by the building code; and the other could have been brought into conformity "at a relatively nominal price without it being completely destroyed."

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Based on the foregoing, plaintiffs contended that Rowan was negligent in that "[h]e failed to properly interpret the law and the building code pertaining to the greenhouses owned by the plaintiffs" and "he illegally required that the plaintiffs demolish the greenhouses."

In their answer defendants alleged, *inter alia*, that Rowan as Chief Building Inspector of the City of Wilmington, North Carolina, is a public official of the City of Wilmington, North Carolina. As such, he is immune from civil liability for his official acts, unless committed with malice or corruption. Plaintiffs have failed to allege any such malice or corruption in the actions of the Chief Building Inspector and, as such, their Complaint against the Chief Building Inspector should be dismissed.

Defendants subsequently moved for summary judgment dismissing the action as to defendant Rowan on the basis of this allegation in their answer.

From the granting of the motion for summary judgment dismissing the action as to defendant Rowan, plaintiffs appeal.

Franklin L. Block for plaintiff appellants.

Martin & Wessell, by John C. Wessell, III, for defendant appellees.

WHICHARD, Judge.

In *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976), Chief Justice Sharp, writing for our Supreme Court, stated the following:

[A]s this Court said in *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E. 2d 783, 787 (1952), "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable *unless it be alleged and proved* that his act, or failure to act, was corrupt or malicious (citations omitted), or that he acted outside of and beyond the scope of his duties." (Emphasis added.) As long as a public officer lawfully exercises the judgment and discretion with which

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he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.

The Court in *Smith*, applying the foregoing statement in ruling on the denial of defendants' motion to dismiss, found that while the allegations there did not *in totidem verbis* allege malice or corruption on the part of defendants, they were "in the broad and general terms permitted by G.S. 1A-1, Rule 8(a)" sufficient to withstand the motion.

Plaintiffs' complaint here, like the complaint in *Smith*, fails to allege *in totidem verbis* that the actions of defendant Rowan were "corrupt or malicious." In comparing the complaint here with that in *Smith*, we find that it also lacks allegations such as those which the Court there found sufficient to withstand the motion to dismiss.¹ Moreover, plaintiffs' answers to interrogatories and affidavit in response to the motion for summary judgment in no way forecast evidence of malice or corruption in Rowan's actions. See *Cone v. Cone*, 50 N.C. App. 343, 274 S.E.2d 341 (1981); *Best v. Perry*, 41 N.C. App. 107, 109-110, 254 S.E.2d 281, 284 (1979); 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d ed. Phillips Supp. 1970). There being, then, neither sufficient allegation nor forecast of evidence that Rowan acted maliciously or corruptly, he could not be liable to plaintiffs, and the granting of summary judgment dismissing the action as to him was thus proper, if at the time he performed the actions complained of he: (1) was "a public official" of the city of Wilmington, and (2) was "engaged in the performance of governmental duties involving the exercise of judgment and discretion."

Our research discloses no North Carolina cases determinative of these issues. By way of general authority, in 62 C.J.S., Municipal Corporations, § 463 at 895-896 (1949), we find the following:

The courts have stated certain tests and distinctions [for deciding whether a person is an officer or merely an agent or employee of a municipality], such as that a municipal office is created only by legislation . . . while the relation of an employee to a municipal corporation is based solely on contract; that an officer is generally required to take an

¹ The allegations there are summarized by the Court in *Smith*, 289 N.C. at 305-306, 222 S.E.2d at 414-415.

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oath of office . . . while an agent or employee is not required to do so; that an officer performs public functions delegated to him as part of the sovereign power of the state . . . while no share of the sovereign powers or functions of the government is vested in an employee; that official trust or responsibility is imposed by law on an officer . . . but not on an employee; that the law prescribes and imposes the duties of an officer . . . but not those of an employee; that an officer is charged with fixed, public duties . . . while the duties of an employee are of nongovernmental nature, and are neither certain nor permanent; that an officer is sometimes vested with a certain measure of discretion . . . whereas the duties of an employee are purely ministerial; and that an officer is empowered to act in the discharge of a duty or legal authority in official life, whereas an employee does not discharge independent duties, but acts by the direction of others.

In applying these tests to the position of chief building inspector for the city of Wilmington, we find that the position accords with the criteria set forth. First, the position of chief building inspector is "created . . . by legislation" which authorizes every city in North Carolina to create a building inspection department, to appoint inspectors and to give the inspectors so appointed titles "generally descriptive of the duties assigned." G.S. 160A-411 (Supp. 1979). Second, the chief building inspector is "required to take an oath of office." Wilmington City Charter § 9.6 (Supp. 1979).² Third, the chief building inspector performs "public functions delegated to him as part of the sovereign power of the state"; "official trust or responsibility is imposed by law" on him; "the law prescribes and imposes the duties" he must perform; and he is "charged with fixed, public duties" and "empowered to act in the discharge of a duty or legal authority in

² Sec. 9.6. Oath of office required.

Before entering upon the discharge of their duties, the holders of the following offices and positions shall be required to take the oath prescribed for public officers before some person authorized to administer oaths: The city manager, assistant city manager, city clerk, tax collector, any assistant city clerk or assistant tax collector, city treasurer, chief of police and each member of the police force, the building inspector and all employees empowered to enforce the Building Code, and the electrical inspector and all employees empowered to enforce the Electrical Code.

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official life." See G.S. 160A-411 to -438; Wilmington City Code § 6-8 (Supp. 1979).³ Fourth, the chief building inspector is "vested with a certain measure of discretion." North Carolina General Statutes, Chapter 160A, part 5 contains numerous provisions which can only be interpreted as placing discretionary powers in the inspectors designated and appropriately entitled by the cities of this State.⁴

We thus conclude, and so hold, that the chief building inspector for the city of Wilmington is "a public official" of that city. We further conclude, and so hold, that at the time of the acts complained of here defendant Rowan, as chief building inspector for the city of Wilmington, was acting in the performance of duties assigned to him by General Statutes chapter 160A, part 5, and by the Wilmington City Code, which duties involved the exercise of his discretion in determining whether plaintiffs' greenhouses were constructed in compliance with applicable law.⁵ He was thus "engaged in the performance of governmental duties involving the exercise of judgment and discretion."

Because the defendant Rowan was at the time he performed the acts complained of "a public official . . . engaged in the performance of governmental duties involving the exercise of judgment and discretion," plaintiffs were required to allege and to forecast evidence tend-

³ Sec. 6-8. Powers and duties generally.

The building inspector shall have all of the powers and duties provided by the laws of the state and the provisions of this Code and other ordinances of the city in the conduct of his official duties.

⁴ G.S. 160A-420 provides that inspectors "shall make as many inspections ... as may be necessary to *satisfy them* that the work is being done according to ... applicable ... laws and ... the terms of the permit."

G.S. 160A-423 provides that the "inspector shall make a final inspection, and if *he finds* that the completed work complies ... he shall issue a certificate of compliance."

G.S. 160A-425 provides that when the "*inspector finds* any defects," he is to notify the owner or occupant.

G.S. 160A-426 provides that "[e]very building which *shall appear to the inspector* to be especially dangerous ... shall be held to be unsafe"

G.S. 160A-429 provides that if "*the inspector shall find* that the building ... constitutes a ... hazard," he shall order remedial steps taken. (Supp. 1979).

(Emphasis supplied *passim*.)

⁵ Reference is made to the statutory authorization and description of duties set forth in footnote four above.

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ing to prove "that his act . . . was corrupt or malicious . . . or that he acted outside of and beyond the scope of his duties" in order to withstand the motion for summary judgment. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430. This they failed to do. Consequently the trial court properly entered summary judgment dismissing the action as to defendant Rowan, and its judgment is

Affirmed.

Judges CLARK and WEBB concur.

DERRICK WAYNE SAMUEL, BY HIS GUARDIAN AD LITEM GEORGE KELLY SAMUEL v.
SWANSON SIMMONS AND BOB STEVENS, INDIVIDUALLY AND DOING BUSINESS AS
SNOW WHITE LAUNDRY

No. 8017SC550

(Filed 20 January 1981)

1. Negligence §§ 53.1, 59.2— duty of care to invitees and licensees

A landowner is under a duty to exercise ordinary care to maintain in a reasonably safe condition that part of his premises designed for an invitee's use, but when an invitee exceeds the scope of his invitation by going into a part of the business premises where he has no business purpose, he becomes a licensee and a landowner then owes him only the duty to refrain from injuring him willfully or wantonly and from increasing any hazard by active and affirmative negligence.

2. Negligence § 59.3— action by licensee — insufficiency of evidence

Defendant laundromat owners were not liable to minor plaintiff for injuries he suffered when he went into the maintenance area behind a row of washing machines at the laundromat and fell into the moving parts of a washing machine since the minor plaintiff became a licensee when he went into the maintenance area behind the machines, and plaintiff failed to allege or show that defendants injured him willfully or that they increased the hazard by affirmative negligence.

3. Negligence § 51— attractive nuisance doctrine

To establish liability under the attractive nuisance doctrine plaintiff must show that not only were children attracted to the instrumentality or conditions which caused injury or death, but that such children had been attracted to such instrumentality or conditions to such an extent and over such a period of time that any person of ordinary prudence would have foreseen that injury or death was likely to result.

4. Negligence § 51.3— maintenance area in laundromat — no attractive nuisance

In an action to recover for injuries suffered by the minor plaintiff when he went

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into the maintenance area behind a row of washing machines at defendants' laundromat and fell into the moving parts of one of the washing machines, plaintiffs' evidence was insufficient to be submitted to the jury under the attractive nuisance doctrine where there was no evidence that minor plaintiff or any other customer or invitee had ever previously entered the maintenance area of the laundromat.

APPEAL by plaintiff from *Walker (Hal)*, Judge. Judgment entered 13 February 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 6 January 1981.

On 18 December 1976, Derrick Wayne Samuel, aged six, went through a plywood gate or door and into the maintenance area behind a row of 22 washing machines at the Snow White Laundry. His mother had brought him while she did her family laundry. Samuel injured himself when he fell into the moving parts of one of the washing machines and caught his arm between a moving belt and pulley. The backs of the machines had been removed, exposing the working parts.

The gate through which Derrick passed was 53 inches high and hinged. The gate was within three feet of the public restrooms and served to close off a three-foot wide maintenance area that ran behind the washing machines. The gate was not served by a latch, and it is not clear from the record whether Derrick opened the door or whether the door was already open.

Children often accompanied their parents to the laundromat, young people frequented the business, but the area behind the machines was not one where business invitees were expected to go.

At the close of the plaintiff's evidence, the trial judge granted the defendants' motion for a directed verdict. Plaintiff appealed.

Max D. Ballinger for plaintiff appellant.

Gardner, Gardner, Johnson & Etringer, by Gus L. Donnelly, for defendant appellees.

HILL, Judge.

The sole question presented on appeal is whether the trial court properly granted the defendants' motion for a directed verdict at the close of plaintiff's evidence.

The motion by defendants for directed verdict raises the ques-

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tion of whether, as a matter of law, the evidence offered by the plaintiff, when presented in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. *Roberts v. Memorial Park*, 281 N. C. 48, 187 S. E. 2d 721 (1972). Every reasonable inference which can be drawn from the evidence must be considered in determining whether such evidence is sufficient to withstand defendants' motion for a directed verdict. *Sawyer v. Shackelford*, 8 N. C. App. 631, 175 S. E. 2d 305 (1970).

Plaintiff contends he brought his action under three legal theories and that the facts presented support one or more of them. The theories are:

- (1) that defendants were negligent in maintaining a nuisance attractive to a minor;
- (2) that defendants were negligent in maintaining a condition likely to produce injury to the minor plaintiff; and
- (3) that defendants were negligent in failing to warn patrons of a lurking danger.

[1] A landowner is not an absolute insurer as to the safety of his invitees. *Graves v. Order of Elks*, 268 N. C. 356, 358, 150 S. E. 2d 522 (1966). When Derrick Samuel entered defendants' laundry with his mother, his legal status was that of an invitee by implication. *Foster v. Weitzel*, 17 N. C. App., 90, 91, 193 S. E. 2d 329, 330 (1972), *cert. denied* 282 N. C. 672 (1973). A landowner is under a duty to exercise ordinary care to maintain in a reasonably safe condition that part of his premises designed for the invitee's use, *Wrenn v. Convalescent Home*, 270 N. C. 447, 154 S. E. 2d 483 (1967); but when an invitee exceeds the scope of his invitation by going into a part of the business premises where he has no business purpose, he becomes a licensee. *Wilson v. Downtin*, 215 N. C. 547, 551, 2 S. E. 2d 576 (1939). As to a licensee, a landowner owes only the duty to refrain from injuring him willfully or wantonly and from increasing any hazard by active and affirmative negligence. *Thames v. Teer Co.*, 267 N. C. 565, 569, 148 S. E. 2d 527 (1966).

[2] Plaintiff's own evidence and answers to defendant's request for admissions establish that Derrick Samuel was a licensee at the time of his injury. Diane Samuel testified that she had never been into the maintenance area behind the gate, that she had no reason to go there and that she had never seen others there. Plaintiff admitted in his

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response to defendants' request for admissions that a business invitee would not be reasonably be expected to go into the maintenance area behind the machines.

Plaintiff has not alleged or made any showing that defendants injured him willfully or wantonly or are guilty of affirmative negligence. For that reason, plaintiff cannot recover under his second and third theories.

Plaintiff has alleged, however, that the doctrine of attractive nuisance applies. Where that doctrine is applicable, a landowner has a duty of ordinary care even though the plaintiff is a licensee.

Generally, the attractive nuisance doctrine is applicable when, and only when, the following elements are present: (1) the instrumentality or condition must be dangerous in itself; (2) it must be attractive and enticing to young children; (3) the children must be incapable by reason of their youth of comprehending the danger involved; (4) the instrumentality . . . must be left unguarded and exposed at a place where children of tender years are accustomed to resort or where it is reasonably to be expected that they will resort; (5) it must be reasonably practical either to prevent access to the instrumentality or else render it innocuous without obstructing any reasonable purpose or use for which it was intended.

9 Strong, N.C. Index 3d, Negligence, § 51, p. 466; citing *Lanier v. Highway Comm.*, 31 N. C. App. 304, 229 S. E. 2d 321 (1976). Also see *McCombs v. City of Asheboro*, 6 N. C. App. 234, 242-3, 170 S. E. 2d 169 (1969).

[3] To establish liability under the attractive nuisance doctrine plaintiff must show that not only were children attracted to the instrumentality or conditions which caused injury or death, but that such children had been attracted to such instrumentality or conditions to such an extent and over such a period of time that any person of ordinary prudence would have foreseen that injury or death was likely to result. *Lovin v. Hamlet*, 243 N.C. 399, 90 S.E. 2d 760 (1956). Such evidence is absent from the record.

[4] Plaintiff's evidence shows that the door was located within three feet of the public restroom. The evidence further shows that children

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played in the areas outside the maintenance area. There is no evidence, however, that plaintiff *or any other customer or invitee* had ever entered the maintenance area previously. Plaintiff had accompanied his mother to the laundromat almost weekly. Plaintiff's mother testified she had come to the laundromat about 300 times, but there is no evidence that plaintiff was ever previously attracted to the maintenance area. The record is void of any evidence that the maintenance area constituted an attractive nuisance.

The trial judge was correct in granting defendants' motion for a directed verdict.

Affirmed.

Judges ARNOLD and WELLS concur.

WENDELL PARKER v. GLORIA O. WINDBORNE AND WALTER ROBERT WINDBORNE

No. 806SC328

(Filed 20 January 1981)

Automobiles §§ 62.3. 83.2— jogger struck by vehicle — issues of fact raised — summary judgment improper

In an action to recover for personal injuries sustained by plaintiff jogger when he was struck by defendant's automobile, the trial court erred in entering summary judgment for defendants where there were issues of fact as to whether (1) one defendant was negligent in driving the automobile into plaintiff on the highway while the visibility was clear, thereby failing to keep a proper lookout or to keep the vehicle under control; (2) plaintiff's negligence in violating G.S. 20-174(d) by not jogging on the left-hand side of the road was a proximate cause of his injury; and (3) plaintiff failed to keep a proper lookout in that he saw the vehicle, took three or four more steps, and then started to cross the road in front of the vehicle.

Judge WHICHARD concurs in the result.

APPEAL by plaintiff from *Small, Judge*. Judgment entered 28 November 1979 in Superior Court, HERTFORD County. Heard in the Court of Appeals 7 October 1980.

Plaintiff brought this action against the defendants for personal injuries he received on U. S. Highway 158 between Winton and Murfreesboro. He alleged that his injuries were proximately caused by the

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negligence of the defendant, Gloria O. Windborne, who was operating a family purpose automobile owned by defendant Walter Robert Windborne with the consent of Walter Robert Windborne.

The plaintiff testified by deposition that on 17 August 1977, he was jogging in a westerly direction on the right-hand side of a two-lane highway running from Winton to Murfreesboro. At one point he testified, "I was about in the middle of it running towards my house" At another point he testified: "As to whether I was a little inside of the white line that's alongside the road, right. I was probably two and one-half feet inside the white line." He looked back and saw the automobile operated by Gloria O. Windborne approaching from the east. He "probably took about 3 or 4 more steps" and started crossing the road. He "did not look back again to see where the car was." The plaintiff stated, "I observed [the automobile] enough to know that if I crossed the road I could make it" He testified he was struck just after he crossed the center line of the highway. He did not hear a horn or the sound of tires squealing.

The defendant moved for summary judgment, relying on the plaintiff's deposition. The plaintiff filed no papers in opposition to the motion. The court granted defendant's motion, and the plaintiff appealed.

Thomas L. Jones for plaintiff appellant.

Gram and Baker, by Ronald G. Baker, for defendant appellees.

WEBB, Judge.

At the outset, we note that the deposition of plaintiff forecasts sufficient evidence to be considered by the jury as to the negligence of the defendant Gloria O. Windborne. The fact that she drove the automobile into the plaintiff on the highway while the visibility was clear is some evidence that she did not keep a proper lookout or keep the vehicle under control and bring it to a halt so as to avoid a collision. This is evidence of negligence.

Since the materials submitted and considered by the court forecast at trial sufficient evidence of negligence by the defendant Gloria O. Windborne, we find the sole remaining issue on appeal is whether there was error in allowing summary judgment on the ground that plaintiff was contributorily negligent as a matter of law. There have

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been many cases dealing with the question of contributory negligence as a matter of law on the part of pedestrians crossing a street or highway who were struck by vehicles. See *Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980); *Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967); *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964); *Holland v. Malpass*, 255 N.C. 395, 121 S.E. 2d 576 (1961); *Landini v. Steelman*, 243 N.C. 146, 90 S.E. 2d 377 (1955); *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589 (1955); *Foster v. Shearin*, 28 N.C. App. 51, 220 S.E. 2d 179 (1975); *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975); *Gentry v. Hackenberg*, 23 N.C. App. 96, 208 S.E. 2d 279 (1974); *Downs v. Watson*, 8 N.C. App. 13, 173 S.E. 2d 556 (1970). The briefs cite no cases, and we have found none, which deal with the question of a pedestrian jogging on the highway who is struck by an automobile as he is moving to the other side of the highway. We believe the rule from the above cited cases is that even if all the evidence shows a pedestrian struck by a vehicle was contributorily negligent, summary judgment against the pedestrian is not proper unless all the evidence so clearly establishes the pedestrian's negligence as one of the proximate causes of the injury that no other reasonable conclusion is possible.

In the case sub judice, it appears from the plaintiff's deposition that he violated G.S. 20-174(d) in not jogging on the left-hand side of the road. He was negligent in so doing. The question then becomes whether from a forecast of the evidence the jury could only conclude that this negligence was a proximate cause of the injury. See *Simpson v. Wood*, 260 N.C. 157, 132 S.E. 2d 369 (1963); *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484 (1948); *Pope v. Deal*, 39 N.C. App. 196, 249 S.E. 2d 866, cert. denied, 296 N.C. 737, 254 S.E. 2d 178 (1978).

The statute (G.S. 20-174(d)) requiring pedestrians to walk on the left-hand side of any highway is designed to protect the pedestrian, facing the opposite direction, from being struck by a vehicle approaching from the rear in the right-hand lane of travel. The plaintiff herein, jogging on the right-hand side of the highway, heard and then observed the defendant's vehicle approaching from the rear. The distance from the vehicle to plaintiff when it was first observed and the speed of the approaching vehicle does not appear in the record on appeal. It does appear that plaintiff had crossed the center line into the left-hand lane when struck. From this sparse forecast of the evidence, more than one inference can reasonably be drawn as to whether the act of the plaintiff in violating the statute was a proximate cause of his injury; it should be submitted to the jury as to which inference should

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be drawn.

There is also evidence the plaintiff did not keep a proper lookout. He testified that after he saw the vehicle, he took three or four more steps and started to the left side of the road. We believe it is a jury question as to whether this was negligence and whether it was a proximate cause of the accident. Plaintiff testified he observed the vehicle enough to know he could reach the left lane. The record contains no evidence as to the speed of the vehicle or how many feet it was from the plaintiff when he last saw it. We hold it is for the jury to determine whether it was lack of due care on the part of the plaintiff to change sides of the road as he did and whether this was a proximate cause of the accident.

Reversed and remanded.

Judge CLARK concurs.

Judge WHICHARD concurs in the result.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY COLEY PROPERTIES, INC., A NORTH CAROLINA CORPORATION, BY E. JAMES MOORE, SUBSTITUTED TRUSTEE

No. 8022SC468

(Filed 20 January 1981)

1. Mortgages and Deeds of Trust § 25— appeal of foreclosure proceeding — requirements of bond

In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to G.S. 45-21.16(d), and a superior court judge may require a bond upon appeal from that court pursuant to G.S. 1-292, and if the bond is not posted, the trustee may proceed with the foreclosure; however, neither statute gives the clerk or judge the power to make the posting of a bond a condition to the appeal, and it was error for the superior court to dismiss respondents' appeal from that court when the bond required by the court was not posted.

2. Mortgages and Deeds of Trust § 25— foreclosure proceeding — advancements on notes secured by deed of trust — use of "shuck note" as evidence of advancements

In a proceeding to foreclose a deed of trust securing a note to a bank which provided for future advancements, testimony that advancements were made on the original note and that "shuck notes" not secured by a deed of trust were used as

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evidence of the advancements on the original note was sufficient to support a finding by the court that advancements were made on the original note which was secured by the deed of trust.

APPEAL by respondents Coley Properties, Inc., Charles R. Coley and Patricia H. Coley from *Hairston, Judge*. Judgment entered 28 January 1980 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 11 November 1980.

This appeal involves a foreclosure proceeding filed on 8 October 1979. After a hearing, the clerk of superior court authorized a foreclosure, and the respondents appealed to the superior court. The clerk ordered the respondents to post a bond of \$60,000.00 to protect the petitioner, which the respondents failed to do.

The matter was heard by Judge Hairston, at which time the petitioner presented evidence that the respondents executed a note to the Northwestern Bank dated 13 December 1976 in the amount of \$1,095,000.00 secured by a deed of trust of the same date which was duly recorded in Alexander County. The note provided for future advances. David Deal, Jr., the executive vice-president of Northwestern Bank in Taylorsville, testified that at the time the note and deed of trust were executed, he discussed future advancements on the note with the Coleys. He testified further, "[w]hen those advances were made, the Bank used a written instrument which we call a shuck note, which was normally signed by the borrower evidencing advances . . ." On 5 May 1977 a "shuck note" in the amount of \$938,000.00 was executed which represented all the advances with interest which had been made. This sum was due and not paid by the borrower.

The court found facts sufficient under G.S. 45-21.16(d) for the trustee to sell the property under the deed of trust and entered an order authorizing the substituted trustee to proceed with the foreclosure. The respondents gave notice of appeal, the court ordered that the respondents post a bond in the amount of \$500,000.00 within 30 days to protect the Northwestern Bank from any probable loss by reason of the appeal.

On 12 March 1980 the superior court purported to dismiss the appeal for the reason that the \$500,000.00 bond had not been filed. The respondents gave notice of appeal from the order dismissing the appeal and filed a petition for a writ of certiorari with this Court. This Court allowed the petition and issued the writ of certiorari.

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Hudson, Petree, Stockton, Stockton and Robinson, by William F. Maready, and Fleming, Robinson, Bradshaw and Hinson, by John R. Wester, for petitioner appellees.

James, McElroy and Diehl, by William K. Diehl, Jr., for respondent appellants.

WEBB, Judge.

[1] We consider first the requirement that the respondents post a bond. In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to G.S. 45-21.16(d), and a superior court judge may require a bond upon appeal from that court pursuant to G.S. 1-292, *In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978). G.S. 45-21.16(d) provides in part as follows:

The act of the clerk . . . may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

G.S. 1-292 provides in part:

If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking.

As we read these two statutes, each provides protection for the foreclosing party by giving the clerk in one case and the judge in the other the power to require the appealing party to post a bond. If the bond is

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not posted, the trustee may proceed with the foreclosure. Neither statute gives the clerk or judge the power to make the posting of a bond a condition to the appeal.

In the case sub judice, the trustee could have proceeded with the foreclosure since the respondents did not post a bond as required by the clerk or judge. The superior court did not have the power to require the respondents to post a bond as a condition to the appeal, and it was error for the superior court to dismiss the appeal when the bond was not posted.

[2] We next address the question of the correctness of the order in the superior court that the trustee be authorized to proceed with the foreclosure. The appellants do not contend the court did not find sufficient facts to authorize the foreclosure sale pursuant to G.S. 45-21.16(d). They do contend the evidence does not justify the findings of fact. They argue that the evidence shows there was not an advancement on the note of 13 December 1976. The respondents say the advancements were made on the "shuck note" which was not secured by deed of trust and the foreclosure sale should not have been authorized. We hold that the testimony of Mr. Deal that the advancements were made on the note, and the "shuck notes" were used as evidence of the advancements on the original note, was testimony from which the court could find that advancements were made on the note dated 13 December 1976. The evidence supported the findings of fact by the superior court, and we are bound by them. *See In re Cooke*, 37 N.C. App. 575, 246 S.E. 2d 801 (1978).

We reverse the order of the superior court dismissing the appeal for the failure to post a bond. We affirm the order of the superior court which authorized the trustee to foreclose under the deed of trust.

Reversed in part; affirmed in part.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 JANUARY 1981

HAMILTON v. HAMILTON No. 8014DC629	Durham (77CVD645)	Affirmed
PATTERSON v. EDDIETRON No. 8021SC377	Forsyth (77CVS3668)	No Error
STATE v. CRITE No. 8018SC655	Guilford (79CRS56305) (79CRS56307)	No Error
STATE v. DEBROUX No. 807SC583	Nash (79CRS8500)	No Error
STATE v. THAMES No. 8026SC575	Mecklenburg (79CRS49829)	No Error
TAYLOR v. BANK No. 8014SC678	Durham (78CVS530)	Affirmed
WILLIFORD v. MILLS N. 8010DC534	Wake (79CVD6857)	Affirmed

FILED 20 JANUARY 1981

CREDIT UNION v. WORTHINGTON No. 803DC516	Pitt (78CVD1178)	Affirmed
IN RE SMITH No. 8020SC448	Union (79SP160)	Affirmed
ROSE v. FULLER No. 809DC343	Vance (79CVM1165)	Affirmed
STATE v. COFIELD No. 805SC548	New Hanover (79CRS15072)	No Error
STATE v. COHICK No. 807SC746	Edgecombe (79CRS4109)	No Error
STATE v. CROMARTIE No. 8012SC752	Cumberland (79CRS13175)	No Error
STATE v. EGGLESTON No. 804SC546	Onslow (79CRS21555) (79CRS21559) (79CRS21558) (79CRS21553)	No Error

STATE v. HOOTS No. 8022SC669	Davidson (79CR11350)	No Error
STATE v. JONES No. 8026SC576	Mecklenburg (79CRS68460)	No Error
STATE v. McLEAN No. 8025SC742	Caldwell (79CRS7223) (79CRS7251)	No Error
STATE v. NANCE No. 8020SC786	Stanly (80CRS0144) (80CRS0150) (80CRS0151)	No Error
STATE v. WILLIS No. 803SC598	Carteret (79CR8426)	Reversed

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STATE OF NORTH CAROLINA v. RICHARD SALEM

No. 8026SC607

(Filed 3 February 1981)

1. Constitutional Law § 51— delay between offense and arrest — no denial of speedy trial

In a prosecution of defendant for possession and sale of methamphetamine where defendant contended that he was denied his constitutional right to a speedy trial as a result of the 367 day delay from the time of the occurrence of the alleged drug sale until his first appraisal of the charges lodged against him arising out of that event, the trial court, in determining the nature and effect of any pre-indictment delay which occurred in this action, should have considered the interim between the date the alleged transaction occurred, 21 December 1977, and the date of defendant's arrest in May 1979 rather than the interim between the date the alleged transaction occurred and the date defendant was first indicted, since the original indictment, issued on 3 April 1978 and dismissed by judicial order on 17 August 1979, was null and void. However, although the trial court did not consider the correct time interval, such error was not prejudicial to defendant, where defendant failed to demonstrate (1) that the State intentionally delayed in accusing him in order to impair his ability to defend himself, as the State first delayed in arresting defendant for the purpose of keeping its undercover investigation a secret, the fact that the State had gone ahead and procured the original indictment against defendant on 3 April 1978, such indictment being valid from that time until the time the court dismissed it, illustrated that the State was not intentionally delaying to harass defendant, and the State was unable to locate defendant during most of the delay; and (2) that actual or substantial prejudice to defendant occurred as a result of the pre-indictment delay, as defendant did not establish that any significant evidence was lost as a result of the State's delay in accusing him of the crimes, and defendant failed to demonstrate that any evidence lost as the result of faded memories of witnesses would have been significant or helpful to his defense.

2. Narcotics § 4— controlled substance not introduced into evidence — sufficiency of evidence

In a prosecution of defendant for possession and sale of methamphetamine, there was no merit to defendant's contention that the trial court erred in denying his motion to dismiss made on the ground that the controlled substance was not properly introduced into evidence, where an undercover agent testified that defendant sold him a substance which defendant represented as being methamphetamine; in further testimony the agent stated that he placed the substance which he purchased from defendant in an envelope marked State's exhibit No. 1; defendant stipulated that the substance contained in the State's exhibit No. 1 was 25% methamphetamine; this exhibit was opened and passed among the jurors; and it was not necessary, in light of all the evidence before the jury, that the substance technically be introduced into evidence.

3. Criminal Law § 26.5; Narcotics § 5— conviction of possession and sale of

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methamphetamine — no double jeopardy

Possession of methamphetamine and sale of methamphetamine are two separate and distinct offenses, and defendant could be convicted of both crimes and not have his constitutional rights violated.

4. Criminal Law § 90.2— court's refusal to declare witness hostile — no error

The trial court did not err in refusing to declare a confidential informant a hostile witness where defendant called the witness to the stand during the *voir dire* conducted on defendant's pretrial motion to dismiss for failure to prosecute promptly; the evidence did not demonstrate that during the trial the witness's interests were opposed to those of defendant; and following the denial of his motion to have the informant declared a hostile witness, defendant did not call him as a witness so that it was impossible to know whether the informant would have in fact been a hostile witness.

5. Criminal Law § 102.6— jury argument — no impropriety

Statements by the district attorney during his closing argument that the jury should consider "who has reason to tell a lie about it and who has the reason to tell the truth," and that the jury had a responsibility like that of law enforcement officials to "clean up crime in this country" were within permissible bounds, and the trial judge did not abuse his discretion in allowing the district attorney to make these remarks.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 22 January 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 November 1980.

On 27 August 1979 defendant was indicted on charges of felonious sale of a controlled substance, methamphetamine, and felonious possession with the intent to sell the same. On 21 January 1980 defendant made a pretrial motion asking the court to dismiss the case on the ground that there was prejudicial delay in apprising defendant of the charges lodged against him. Defendant argued that the delay worked a denial of his constitutional right to a speedy prosecution. The court conducted a *voir dire* and heard evidence presented by both the State and defendant.

In summary, the evidence produced on *voir dire* tended to show that an original bill of indictment charging defendant with the crimes arising from the 21 December 1977 incident was returned on 3 April 1978. During this interim between the date of the alleged transaction and the date of the original indictment, and on into November of 1978, an undercover drug operation concerning this defendant was being continuously implemented by the S.B.I. and Mecklenburg County officials. The authorities were making an effort to identify the source of defendant's alleged drug supply.

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Following the conclusion of this investigation the authorities made a futile attempt to locate defendant. On 23 December 1978, an S.B.I. agent went to defendant's legal address, 112 Chapman Street, Charlotte. There he talked with defendant's mother and stepfather. They informed the agent that defendant had been using their address strictly as his legal and mailing address. Defendant had actually been living in different apartments in the Charlotte area. Throughout this period of time defendant had been employed in the operation of a beauty salon owned by his mother. Officers went to the beauty salon on 23 December 1978 endeavoring to locate defendant. There they were advised that defendant had not been at the business in several weeks. The authorities were unable to discover the whereabouts of defendant after the conclusion of their investigation.

On 8 February 1979 the original indictment of 3 April 1978 was dismissed with leave to reinstitute it later. The indictment was dismissed at this time because defendant had failed to appear and could not be readily found. Subsequently, defendant was located, and he was arrested on 9 May 1979. On 14 June 1979, the State purportedly gave notice of the reinstitution of the proceedings which previously had been dismissed for nonappearance. However, the written notice of the reinstitution of the proceedings was never properly filed. Pursuant to a motion by defendant, the court issued an order on 17 August 1979 dismissing the case, because no written notice of reinstitution of the action was on file. This dismissal declared the original bill of indictment null and void. A new bill of indictment charging defendant with these crimes was returned on 27 August 1979. This action was prosecuted on the basis of this later indictment.

At the conclusion of the *voir dire* the court denied defendant's pretrial motion to dismiss for the lack of a speedy prosecution. As basis for its denial of defendant's motion the court concluded that the delay occurring from the date of the incident in December 1977 until the date of the first indictment in April of 1978 was not an unusually long interim in light of the continuing S.B.I. undercover operation. The State's delay in procuring the indictment was primarily for the purpose of obtaining additional information necessary to identify the source of defendant's alleged drug supply. Additionally, the court concluded that the delay did not create a reasonable possibility of prejudice to defendant.

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Following its decision on defendant's motion the court heard evidence in the cause. The evidence presented by the State tended to show the following: Defendant and one Ron Williams had been friends for some time prior to these occurrences. Defendant did not know that Williams had previously been caught selling drugs to the authorities and was cooperating with them as an informant. At approximately 9:55 p.m. on 21 December 1977 defendant met with informant Williams and two S.B.I. undercover agents at the Pressgate, a Charlotte nightclub. Williams had arranged a drug sale between defendant and an S.B.I. agent. After a brief period of conversation inside the nightclub, defendant went outside, where his car was parked, accompanied by Williams and Agent W. M. Riggsbee. Defendant obtained a package, which was later found to contain eight ounces of the drug, methamphetamine, from his car. He gave this package to Agent Riggsbee in exchange for \$4800.

Defendant testified in his own behalf. His testimony tended to show that on 21 December 1977 Williams invited defendant to the Pressgate for a drink. At approximately 9:15 p.m. defendant arrived at the bar, and joined Williams who was seated at a table in the company of several men, all of whom were strangers to defendant. Williams introduced the strangers as business associates from out of town. After a short interval, Williams excused himself from the table and left the bar with one of the strangers whom defendant identified in court as Agent Riggsbee. Williams and Agent Riggsbee were gone from the bar for approximately ten minutes after which they returned to the table. Defendant testified that at this point one of the men seated at the table made some comments with reference to defendant's supplying more drugs which defendant did not understand. Thereafter, defendant and Williams left the Pressgate to go elsewhere for a drink. They did not return to the Pressgate that evening. Defendant denied having made any exchange of drugs, or having received any money.

Upon a plea of not guilty to these charges, defendant was convicted of the felonious sale of a controlled substance for which he received a sentence of not less than eight, nor more than ten years of imprisonment. He was also found guilty of the lesser included offense of misdemeanor possession of methamphetamine for which he was sentenced to a two-year term of imprisonment. Defendant appealed from the judgments entered.

Attorney General Edmisten, by Assistant Attorney General

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Roy A. Giles, Jr., for the State.

Assistant Public Defender Lyle J. Yurko for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant assigns error to the court's denial of his motion to dismiss for failure to prosecute expeditiously. He contends that he was denied his right to due process under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as a result of the 367-day delay from the time of the occurrence of the alleged drug sale until his first appraisal of the charges lodged against him arising out of that event. He maintains that the State's delay was intentional and resulted in prejudice to his defense.

Defendant alleges that the prejudice to his case resulting from the delay occurred for two reasons. First, his memory and the memory of other possible witnesses to the events surrounding the crimes had faded due to the length of the time involved; and, second, the delay had resulted in lost opportunities to procure witnesses.

In *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971), the Supreme Court held that the Sixth Amendment speedy trial provision had no application until a putative defendant in some way became an "accused." In *Marion* the defendant was "accused" when he was indicted. More important to the purpose of this appeal was the Court's holding in *Marion* that the Fifth Amendment requires dismissal of an indictment if it is shown at trial that the pre-indictment delay caused substantial prejudice to a defendant's rights to a fair trial, and that the delay was an intentional device to gain tactical advantage over an accused. *United States v. Marion*, *supra*, 404 U.S. at 324, 30 L.Ed. 2d at 481, 92 S.Ct. at 465, and cases cited therein.

Justice Moore further elaborated on the proper test to be applied in determining whether a defendant's Fifth Amendment rights were violated by a pre-indictment delay in *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976).

This Court also considered pre-indictment delay in *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). There, we held the prosecution must be dismissed due to an intentional four-year delay by the State in securing an

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indictment against defendant. Justice Sharp (now Chief Justice), speaking for the Court, said:

“We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed.”

Numerous federal decisions have expanded on the Fifth Amendment standards applicable to the pre-indictment situation. These decisions have recognized the uncertainty after *Marion* of whether a successful claim under the Fifth Amendment must establish both actual prejudice to the defendant *and* intentional delay on the part of the government. Most are in accord, however, that at least in the absence of intentional governmental delay for the purpose of harassing or gaining advantage over defendant, the burden is on defendant to affirmatively demonstrate actual and substantial prejudice. *United States v. Jackson*, 504 F. 2d 337 (8th Cir. 1974); *United States v. Joyce*, 499 F. 2d 9 (7th Cir. 1974), *cert. den.*, 419 U.S. 1031, 42 L.Ed. 2d 306, 95 S.Ct. 512 (1974); *United States v. Giacalone*, 477 F. 2d 1273 (6th Cir. 1973); *United States v. White*, 470 F. 2d 170 (7th Cir. 1972). Most courts appear to engage in a balancing process, such as that mandated in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), a Sixth Amendment speedy trial case, of weighing the reasonableness of the delay against the prejudice to the accused. *United States v. Jackson*, *supra*; *United States v. Norton*, 504 F. 2d 342 (8th Cir. 1974); *Robinson v. United States*, 459 F. 2d 847 (D.C. Cir. 1972).

289 N.C. at 491, 223 S.E. 2d at 359.

The right to a speedy trial derived from the Fifth Amendment pertains to the time period between the date of the occurrence of the alleged crime, and the date when a defendant is “accused” of com-

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mitting that crime. An individual becomes "accused" of a crime for the purpose of calculating the length of this delay when he is either arrested or indicted. See: *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752, 97 S.Ct. 2044, *rehearing denied*, 434 U.S. 881, 54 L.Ed. 2d 164, 98 S.Ct. 242 (1977); *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971); *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). Therefore, the reviewing court should examine the reasons for the delay which occurred from the time the offense took place until the time when the defendant was either arrested or indicted, depending on which occurred first.

In the case *sub judice* the superior court, when making its determination to deny defendant's motion to dismiss, considered the State's reasons for its delay from the time of the occurrence of the incident on 21 December 1977 until the date the original indictment was issued on 3 April 1978. Under the circumstances of this case that was not the proper time period to be considered. The original indictment, whose date of issuance the court used as the outer time limit of the interim period it considered, was dismissed by judicial order on 17 August 1979. Upon this dismissal the original indictment was null and void. The action was actually prosecuted on an indictment issued on 27 August 1979 charging defendant with these offenses. Therefore, for purposes of the court's inquiry into the pre-indictment delay the court should not have considered the date of the first indictment when computing the proper time interval.

In order to examine correctly the nature and effect of any pre-indictment delay which occurred in this action the court should have considered the interim between the date the alleged transaction occurred, 21 December 1977, and the date of defendant's arrest in May 1979. Defendant's arrest occurred prior to the time of the issuance of the later indictment in August 1979. This interval represents a delay of approximately 17 months between the time the offense allegedly occurred and the time defendant was formally "accused" of these crimes.

Although the court did not consider the correct time interval, we find after a review of the record that this error was not prejudicial to the defense, and was of insufficient consequence to warrant our granting defendant a new trial. After considering the facts and

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reasons for the State's 17-month delay in "accusing" defendant, we do not believe that defendant has sufficiently demonstrated those things required by the test articulated in *Dietz* to show that his Fifth Amendment rights were violated. Defendant has failed to demonstrate either that the State intentionally delayed in "accusing" him in order to impair his ability to defend himself, or that actual or substantial prejudice to the defense occurred as a result of the pre-indictment delay.

Defendant has produced no evidence to show that the State's delay in placing him under arrest was done intentionally in order to damage his ability to defend himself. The testimony of the S.B.I. agents established that during the time interval between 21 December 1977 and late November 1978 the S.B.I. was continuing to conduct an undercover drug investigation of defendant. Agents were trying to locate the source of defendant's alleged drug supply. Defendant asserts that the State's delay for the purpose of keeping its undercover investigation a secret was too long when balanced against his constitutionally protected interest in being able to prepare a reasonably adequate defense.

Nevertheless, the State's legitimate need to protect the existence of an ongoing undercover operation from exposure has been frequently recognized by the courts as a reasonable justification for its delay in bringing charges. *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752, 97 S.Ct. 2044 (1977); *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). At least a portion of the delay in this action was justified on that basis. Delay for investigative purposes is fundamentally unlike delay undertaken by the State to gain tactical superiority over a defendant, or to impair a defendant's ability to defend himself.

Furthermore, the fact that the State had gone ahead and procured the original indictment against defendant on 3 April 1978, such indictment being valid from that time until the time the court dismissed it, illustrates that the State was not intentionally delaying to harass defendant. Rather, the State was unable to locate defendant during most of the delay. Following the conclusion of the S.B.I. investigation of defendant in November 1978, up to the time of defendant's arrest in May of 1979, the authorities were unable to locate defendant. Agents tried to find defendant at his legal address and at the place of business he managed, but they were unsuccessful.

When reviewing these factors in combination, it appears that

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the State had no intention to damage defendant's case by harassment through delay. In fact, it appears that a substantial portion of the delay was caused by defendant, himself. He was aware from the time the S.B.I. talked with his parents in November of 1978 that the authorities were looking for him in connection with these charges. Yet, his whereabouts remained unknown until his arrest in May of 1979. Defendant produced no contradictory evidence to show that the State's delay was ill-intentioned. Therefore, we must find that it was not.

Defendant maintains that he was prejudiced by the State's delay in accusation for two reasons. First, he argues that the lengthy delay resulted in his being unable to procure witnesses to testify in his behalf. The main discrepancy between the facts of the incident as shown by the State's evidence, and those as shown by defendant's evidence, was whether defendant left the bar for a few minutes with Williams and Agent Riggsbee and returned, or whether he remained at the table while Williams and Agent Riggsbee left the bar alone. Defendant argues that the testimony of possible witnesses who were in the Pressgate on the night the alleged crimes occurred might have substantiated his version of the facts, but, due to the delay in accusation, he was unable to locate these witnesses.

At some point between the date the alleged offenses occurred and the date of the trial, the Pressgate nightclub closed. Defendant was able to locate the bartender who had been on duty that night, but he was unable to locate the waitress who had waited on his table. The bartender did not recognize defendant as being a patron of the bar, which was not surprising since defendant testified he had only been to the bar on one or two occasions prior to the night in question. This implies that there was no group of people in the bar who would have noticed defendant's movements that evening, because he was not a regular customer. Defendant was unable to locate the waitress who served his table. According to his testimony his only contact with her was when he ordered a beer, so it seems unlikely that she would have been aware of his comings and goings. There were approximately fifteen other patrons in the bar while defendant was present. Defendant's testimony did not demonstrate that he was familiar with any of the other customers, nor that there was any reason why the other customers should have taken special notice of his presence. Under the circumstances it is highly speculative

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whether the bartender, waitress, or customers would have been able to recall defendant's actions on that particular evening. Defendant did not establish that any significant evidence was lost as a result of the State's delay in accusing him of these crimes.

Additionally, defendant contends that he was prejudiced by the delay for the reason that after such a length of time the memories of those involved had faded to the extent that they were not capable of clearly recalling the events of the evening.

Mere claims of "faded memory" have often been held not to constitute "actual and substantial" prejudice required by *Marion*. *United States v. McGough*, 510 F. 2d 598 (5th Cir. 1975); *United States v. Giacalone*, *supra* [477 F. 2d 1273 (6th Cir. 1973)]; *United States v. Atkins*, 487 F. 2d 257 (8th Cir. 1973). Rather, the courts hold that defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as the result of the pre-indictment delay. *United States v. Parish*, 468 F. 2d 1129 (D.C. Cir. 1972), *cert. den.*, 410 U.S. 957, 35 L.Ed. 2d 690, 93 S.Ct. 1430 (1973). Hardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses. *United States v. Marion*, *supra*.

State v. Dietz, 289 N.C. at 493, 223 S.E. 2d at 360-61.

Defendant's argument on this point is hypothetical. He failed to demonstrate that any evidence lost as a result of faded memories would have been significant or helpful to his defense.

Accordingly, we find that defendant has failed to demonstrate that this pre-indictment delay was either brought about by the State intentionally to harass defendant or to handicap his defense, nor has defendant shown significant prejudice resulting from the delay. Therefore, we hold that defendant's Fifth Amendment right to due process was not violated, and the trial court was not in error in denying defendant's motion to dismiss.

[2] Defendant charges in his second assignment of error that the court erred in denying his motions to dismiss which were based upon the contention that the State had presented insufficient evidence of the crimes. Defendant contends that the State failed to

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establish an essential element of both of the crimes. Specifically, he questions the denial of his motion because the controlled substance, methamphetamine, was not properly introduced into evidence.

The record shows that the drug was never actually put into evidence. However, there was other sufficient evidence to prove that this drug was traded on this occasion to justify the court's allowing the case to go to the jury. Agent Riggsbee testified that defendant sold him a substance which defendant represented as being methamphetamine. In further testimony the agent stated that he placed the substance which he purchased from defendant in the envelope marked as State's Exhibit #1. Defendant stipulated that the substance contained in State's Exhibit #1 was twenty-five percent methamphetamine. This exhibit was opened and passed among the jurors.

We think that this was sufficient evidence reasonably to satisfy the minds of the jurors that the controlled substance was exchanged by defendant in the alleged transaction. It was not necessary, in light of all the evidence before the jury, that the substance technically be introduced into evidence. Accordingly, we hold that the court's denial of defendant's motion to dismiss was not prejudicial error.

Defendant assigns error to the court's failure to require an election between the charges of felonious possession and felonious sale of the controlled substance. He maintains that his trial and conviction of both of these crimes which arose out of the same event violates the Fifth Amendment prohibition against double jeopardy.

[3] The courts of North Carolina have repeatedly ruled that possession of a controlled substance and sale of a controlled substance are two separate and distinct offenses. A defendant may be convicted of both crimes and not have his constitutional rights violated. *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701 (1973); *State v. Harrington*, 283 N.C. 527, 196 S.E.2d 742, *cert denied*, 414 U.S. 1011, 38 L.Ed. 2d 249, 94 S.Ct. 375 (1973); *State v. Anderson*, 27 N.C. App. 72, 217 S.E. 2d 747 (1975); *State v. Yelverton*, 18 N.C. App. 337, 196 S.E. 2d 551, *cert. denied*, 283 N.C. 670, 197 S.E. 2d 880 (1973).

[4] This assignment of error is without merit. Defendant's fourth assignment of error questions the court's refusal to declare the informant, Ron Williams, a hostile witness. Defendant called Williams to the stand during the *voir dire* conducted on defendant's

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pretrial motion to dismiss for failure to promptly prosecute. The witness testified under the direct examination of defendant, and was cross-examined by the State during the *voir dire*. Thereafter, following the State's presentation of its evidence at the trial and prior to the presentation of its own evidence, defendant moved to have Williams declared a hostile witness. This motion was denied.

We do not think that the court's determination of this motion requires us to grant a new trial. The evidence does not demonstrate that during the trial Williams's interests were opposed to those of defendant. In December of 1977, Williams sold drugs to undercover S.B.I. agents. Thereafter, he agreed to assist the S.B.I. as an informant in their investigations. Williams was not paid by the S.B.I. for his aid. He made arrangements for the agents to purchase drugs from defendant on 21 December 1977, which resulted in the charges for which defendant was tried. The undercover operations in which Williams participated were concluded in November 1978. The record contains a letter from the assistant district attorney indicating that in return for Williams's identification of his source of supply for these drugs, and in return for his truthful testimony at trial, the charges against him would be dismissed or a recommendation for his probation would be made.

At the time of the trial the undercover operations in which Williams had assisted had long since been concluded. He had already identified defendant as the source of his drug supply. Williams had done all that the State had requested of him in their agreement. Williams's promise to testify truthfully at trial would not make him a hostile witness.

Furthermore, we are unable to find that the trial court's ruling on the motion prejudiced or impeded the defense in any material way. Following the denial of his motion to have Williams declared a hostile witness, defendant did not call Williams as a witness. Therefore, it is impossible for us to know other than by speculation, whether Williams would have truly been a hostile witness. Williams's testimony during the *voir dire* indicated his willingness to cooperate with the defense. For these reasons we find that there was no prejudicial error resulting from the denial of this motion.

[5] During the district attorney's closing argument he made the statement to the jury that they should consider "who has reason to

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tell a lie about it and who has the reason to tell the truth." The court overruled defendant's objection to this statement. Defendant's final assignment of error is directed to the court's ruling.

The record does not indicate that the district attorney referred to defendant as a "liar", nor that he contended that defendant was "lying". It is not improper for the district attorney to suggest to the jury that the testimony of a defendant should be scrutinized, because a defendant has an interest in testifying falsely, if he believes the jury will give credence to the defendant's false testimony. The Supreme Court has held that it is proper for the district attorney to argue to the jury that it should carefully scrutinize the testimony of a criminal defendant, because he is interested in the outcome of his case. *State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977). The language complained of here amounts to no more than such an admonition. Therefore, we hold that the quoted portion of the State's argument was within permissible bounds.

Defendant objects to another portion of the State's argument in which the district attorney told the jury that they had a responsibility like that of law enforcement officials to, "clean up crime in this county." As a general rule the arguments of counsel must be left largely to the control and discretion of the trial judge. "Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." (Citations omitted.) *State v. Taylor*, 289 N.C. 223, 227, 221 S.E. 2d 359, 362 (1976). We are of the opinion that the trial judge did not abuse his discretion in allowing the district attorney to make these remarks.

In the conduct of this case we find no impropriety of sufficient moment to warrant a new trial. We, therefore, uphold the verdict and judgment and find

No error.

Judges WEBB and MARTIN (Harry C.) concur.

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MICHAEL J. BEGLEY, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NORTH CAROLINA v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8026SC477

(Filed 3 February 1981)

1. Master and Servant § 101— unemployment compensation taxes — employee of church or religious organization

The enactment in 1977 of G.S. 96-8(5)(q) and G.S. 96-8(6)(j), which deleted a previous exemption from unemployment tax liability for nonprofit elementary and secondary schools, did not change the effect of the exemption in G.S. 96-8(6)(k)(15) for persons performing services in the employ of a church organization operated primarily for religious purposes.

2. Master and Servant § 101— employees of Roman Catholic schools — exemption from unemployment tax statutes

Employees of schools operated by the Roman Catholic Church are exempt from the unemployment tax provisions of G.S. Ch. 96 pursuant to G.S. 96-8(6)(k)(15).

3. Master and Servant § 106— unemployment taxes — action to determine applicability — U. S. Secretary of Labor not necessary party

The U. S. Secretary of Labor was not a necessary party to an action to determine whether the unemployment tax statutes applied to employees of schools operated by the Roman Catholic Church in N. C. because State unemployment laws must follow federal statutes in order for the State to gain a credit against the federal unemployment tax and thus obtain funds to operate State employment offices and because the U. S. Secretary of Labor has interpreted the federal statutes to include parochial and parish schools within the scope of the federal unemployment tax provisions, since the present action in no way involves an interpretation of the Federal Unemployment Tax Act.

4. Interest § 1; Master and Servant § 106— unemployment compensation taxes paid under protest — prejudgment interest on payments refunded

The trial court could properly award prejudgment interest on protested unemployment compensation tax payments recovered in an action against the Employment Security Commission brought under G.S. 96-10(f).

Judge WHICHARD dissenting.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 4 March 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 11 November 1980.

This is a civil action wherein plaintiff seeks to recover under G.S. § 96-10(f) payments made under protest for unemployment tax assessments rendered against him by defendant. Plaintiff filed a

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verified complaint alleging, among other things, that plaintiff is "the duly appointed and acting Bishop of the Roman Catholic Diocese of Charlotte, North Carolina (hereinafter called "Diocese"), pursuant to the laws of the Roman Catholic Church;" that the law and rules of the Roman Catholic Church (hereinafter "Church") vest in plaintiff the title to all the property of the Diocese "including without limitation all the Church's schools . . .;" that the schools operated in the Diocese "are, and always have been, operated primarily for religious purposes;" that the schools are supervised by plaintiff through a superintendent appointed by plaintiff; that the schools "are controlled *and* principally supported" by the Church and the Diocese; that the unemployment tax provisions of Chapter 96 of the General Statutes include within the definition of "employment" services performed by employees of non-profit elementary and secondary schools, while excluding from the definition, and thus from coverage, "services performed in the employ of a church or convention or association of churches or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or primarily supported by a church or convention or association of churches" [See G.S. § 96-8(6)k.15.(i)]; that plaintiff made under protest the contributions required under G.S. § 96-9(a)(1) for employers subject to the provisions of Chapter 96; that defendant has failed to make a refund of the payment even though the ninety-day period required by G.S. § 96-10(f) for seeking refunds of payments under protest has expired; that plaintiff recover the protested payment and costs; and that the court "find and declare that the Employment Security Law of the State of North Carolina as set out in Chapter 96 of the General Statutes does not apply to employees of Roman Catholic schools and the Diocese." Plaintiff made a separate claim for relief based upon "impermissible interference with religion by the State" in violation of the First and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the North Carolina Constitution.

Defendant filed answer on 14 November 1978, alleging that the complaint failed to state a claim upon which relief could be granted; that the court lacked jurisdiction of the subject matter; and that plaintiff failed to allege any actions on the part of defendant interfering with the Church's or its members' "substantive religious beliefs or manner or form of worship, or internal operation" of the Diocese. Defendant further alleged that since state unemployment laws must follow the federal statutes in order to

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gain a credit against the federal unemployment tax, and thus obtain funds to operate state employment offices, and since U.S. Secretary of Labor F. Ray Marshall had interpreted the federal statute corresponding to G.S. § 96-8(6) to include church schools within its coverage, Marshall is united in interest with defendant and thus a necessary and indispensable party to the action. Defendant admitted the allegations as to plaintiff's authority, and that the payments had been made under protest, but denied that the schools were operated primarily for religious purposes, that the schools were supervised by a superintendent appointed by plaintiff, and that the schools were controlled and principally supported by the Church.

Plaintiff moved for summary judgment on 9 March 1979, in support of which plaintiff offered his complaint and an affidavit dated 1 March 1979. In the affidavit, plaintiff stated among other things that the parochial or parish school "is considered part of the Church and has an essentially religious mission"; that the pastor "exercises 'ordinary' authority over the parish in spiritual and temporal matters;" and that he is responsible for the "operation, administration, financing and spiritual guidance of the parish and the parish school" and is thus "responsible for the employment of all parish personnel, including the lay teachers in the parish school"; that the Diocese has organized an "Office of Christian Education" and the Diocese's Department of Education has developed comprehensive standards and guidelines for the operation of the Church schools; that "[t]he very purpose of the Roman Catholic Schools of the Diocese of Charlotte is to teach Roman Catholic Doctrine;" that "[i]n all cases the parish assumes the ultimate financial responsibility for the school"; and that the parishes provide many other supporting functions for the Church schools, such as access for religious exercises. Attached to the affidavit were copies of the standards and guidelines heretofore discussed. The record before the court below also contained several letters from the Internal Revenue Service indicating the Service's belief that Church schools were exempt from liability under the federal unemployment tax provisions.

On 29 March 1979, defendant moved to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6), or in the alternative for summary judgment. Defendant made a further motion on that date to join Secretary of Labor Marshall as a necessary and indispensable party or to

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dismiss the action for failure to join a necessary party. In support of the latter motion, defendant offered a letter from the Secretary to Bishop Kelly of the United States Catholic Conference indicating the Secretary's interpretation of the federal statute, and a U.S. Department of Labor policy directive based on this interpretation.

From an order denying defendant's motion for summary judgment, motion to dismiss, and motion to join a necessary party, and allowing plaintiff's motion for summary judgment on the ground that Chapter 96 of the General Statutes does not apply to Church employees or to employees of the Diocesan schools, defendant appealed.

Robert D. Potter, for the plaintiff appellee.

Employment Security Commission Chief Counsel Howard G. Doyle, and Staff Attorneys Thomas S. Whitaker and C. Coleman Billingsley, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] Defendant contends, based on his first assignment of error, that the court erred as a matter of law in granting plaintiff's motion for summary judgment and in denying defendant's motion for summary judgment. Defendant argues that since plaintiff did not deny operating non-profit elementary and secondary schools, and since the General Assembly amended G.S. § 96-8 effective 1 January 1978 to delete an exemption from unemployment tax coverage for non-profit elementary and secondary schools, in order to come into compliance with the federal statute, all church-related elementary and secondary schools in the State, including the schools operated by plaintiff, are now subject to the unemployment tax provisions of Chapter 96 of the General Statutes. We disagree. While the 1978 amendments did serve to subject non-profit elementary and secondary schools to the provisions of the Employment Security Law (Chapter 96 of the General Statutes), *see* G.S. §§ 96-8(5)(q); 96-8(6)(j), these amendments left unchanged the subsection of G.S. § 96-8 that is most relevant to this inquiry. That subsection, G.S. § 96-8(6)k. in pertinent part provides:

The term "employment" shall not include:

...

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15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; . . .

See also 26 U.S.C. § 3309(b)(1).

Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *State ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph Co.*, 288 N.C. 201, 217 S.E.2d 543 (1975); *Fogle v. Gaston County Board of Education*, 29 N.C. App. 423, 224 S.E.2d 677 (1976), and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974); *Jackson v. Stanwood Corp.*, 38 N.C. App. 479, 248 S.E.2d 576 (1978); *Swain County v. Sheppard*, 35 N.C. App. 391, 241 S.E.2d 525 (1978). In addition, when a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same meaning and effect that they had before the amendment. G.S. § 12-4; *Rice v. Riggsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

In the present case, the cited subsection is, in our view, unmistakably clear in its language. The subsection provides an exemption from unemployment tax liability for all persons rendering services as an employee of a church or group of churches, and for all persons employed by organizations operated primarily for religious purposes and "operated, supervised, controlled, or principally supported" by a church or group of churches, without making any distinction between secular and non-secular workers or the tasks that they perform in such employment. In light of the unambiguous statutory language, we cannot, as defendant would have us do, read into the subsection a limitation that the exemption applies only to Roman Catholic Church employees who are *not* involved in educational activities. Since the General Assembly left this subsection completely unchanged when it deleted the previous exemption for non-profit elementary and secondary schools, we must presume that the subsection should be given the same meaning and effect as before the amendment. If the Legislature had intended to remove

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Church school employees from the coverage of the subsection, it would have done so. Defendant's first assignment of error is therefore without merit.

[2] We are also of the view, in response to defendant's fourth assignment of error, that the cited subsection was properly applied to the facts of this case. The schools in question are considered an important part of the Roman Catholic Church, and the Diocese of Charlotte has adopted comprehensive guidelines for the operation and administration of the schools. Church officials, namely the pastors, are responsible for the operation, administration, and *employment* of the schools, and the individual parishes provide whatever financial support is necessary to their continued operation. It follows, then, that the Church schools are themselves part of the Church, and thus the employees of the schools must be considered employees of the Church as well. Although it is not necessary for our determination, we also believe that the complaint, affidavit, and supporting documents offered by plaintiff indicate that the Church schools are operated primarily for religious purposes and are operated, supervised, controlled, *and* principally supported by the Church. The Church schools are therefore exempt from the coverage of the state unemployment tax law, and this assignment of error has no merit.

[3] Defendant next contends, based upon his second assignment of error, that the court erred in refusing to join the United States Secretary of Labor as a necessary party to the action. Defendant bases his argument on the fact that the Employment Security Commission finances its public employment through federal grants, and that the Commission obtains these funds only after the state unemployment tax law is certified by the United States Secretary of Labor as being in compliance with the federal unemployment tax law, thus allowing the state to take a credit against the federal tax. Since the U.S. Secretary of Labor has interpreted the federal statute, to which Chapter 96 of the General Statutes corresponds, to include parochial and parish schools within the scope of the federal unemployment tax provisions, defendant argues, the Commission must subject parochial and parish schools to the state unemployment tax law in order to keep its certification and its funding. Therefore, defendant asserts, as the Secretary's interpretation has prompted defendant to seek contributions from plaintiff, leading to this litigation, complete relief cannot be afforded without

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the joinder of the Secretary. We disagree.

G.S. § 1A-1, Rule 19(b) provides:

The Court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

A “necessary” party is one whose presence is required for a complete determination of the claim, *Behr v. Behr*, 46 N.C. App. 694, 266 S.E.2d 393 (1980), and is one whose interest is such that no decree can be rendered without affecting the party. *Pickelsimer v. Pickelsimer*, 255 N.C. 408, 121 S.E.2d 586 (1961); *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972). In other words, a “necessary” party is one whose interest will be directly affected by the outcome of the litigation. *Equitable Life Assurance Society of United States v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

In the instant case, the U.S. Secretary of Labor was not a necessary party whose joinder was mandatory, as the Secretary’s interests would not be affected by the outcome of this litigation. The present action merely involves a determination based upon Chapter 96 of the North Carolina General Statutes, and in no way does it, or could it, involve an interpretation of the Federal Unemployment Tax Act (FUTA). Whatever interpretation is finally placed on the FUTA by the Secretary, it will not depend on what we interpret our state unemployment law to mean. This assignment of error is without merit.

[4] Defendant lastly contends, based on his third assignment of error, that the court erred in ordering defendant to pay prejudgment interest on the payments refunded to plaintiff. Defendant argues that an award of interest on a refund is prohibited by G.S. § 96-10(e). We disagree. G.S. § 96-10(e) in pertinent part provides:

If not later than five years from the last day of the calendar year with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer or employing unit who has paid such contributions or interest thereon shall make

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application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer or employing unit to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, or if said money which constitutes the overpayment has been in the possession of the Commission for six months or more, a cash refund may be made, without interest . . .

This subsection, however, is not applicable to the present situation. Plaintiff is not making an application for a refund with the Commission due to an overpayment or other adjustment to an otherwise proper contribution, as contemplated by G.S. § 96-10(e); rather, plaintiff is suing the Commission pursuant to G.S. § 96-10(f) to recover payments made to the Commission under protest. G.S. § 96-10(f), the applicable statute for our purposes, provides in pertinent part as follows:

Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this Chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within ninety days thereafter, he may sue the Commission for the amount so demanded; . . . and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive, or contrary to the provisions of this Chapter, the amount paid shall be refunded by the Commission accordingly. The remedy

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provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as one provided by other subsections of this Chapter.

Unlike subsection (e), subsection (f) contains no reference to refunds being made "without interest," nor do we see any reason why interest should not be allowed on refunds made under subsection (e). The tax assessed against plaintiff has been found by the trial court to be "contrary to the provisions of this Chapter," and thus defendant has had improper possession of plaintiff's funds from the time of payment under protest until judgment. Defendant, in the discretion of the trial court, should not therefore be allowed to benefit from the use of the money rightfully belonging to plaintiff. Under the circumstances, the trial court could properly award prejudgment interest on the amount of the protested payment. *See also Raintree v. City of Charlotte*, 49 N.C. App. 391, 271 S.E. 2d 524 (1980). This assignment of error is without merit.

Since the court did not reach the constitutional questions raised by plaintiff in its determination, we find it unnecessary to address those questions here.

Affirmed.

Judge CLARK concurs in the result.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

The 1977 General Assembly in Chapter 727 of the 1977 Session Laws amended the Employment Security Law, G.S. 96-1 *et seq.*, to add to the definition of the term "Employer" contained in G.S. 96-8 (5) the following:

- q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school.

The same act amended G.S. 96-8(6) by adding a new subdivision j. to read as follows:

- j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by

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employees of nonprofit elementary and secondary schools.

The record indicates, as stated in the majority opinion, that the North Carolina Employment Security Commission

finances its public employment through federal grants, and that the Commission obtains these funds only after the state unemployment tax law is certified by the United States Secretary of Labor as being in compliance with the federal unemployment tax law, thus allowing the state to take a credit against the federal tax.

It also indicates that the United States Secretary of Labor has interpreted the federal statute which corresponds to Chapter 96 of the North Carolina General Statutes to include parochial and parish schools within the scope of the federal unemployment tax provisions.

I believe the General Assembly, in enacting the 1977 amendments which added subsection q to G.S. 96-8(5) and subsection j to G.S. 96-8(6), was responding to a perceived threat to federal certification and funding of North Carolina's unemployment compensation program; and that because the federal law, as interpreted and applied by the United States Secretary of Labor, appeared to require application of the Employment Security Law to plaintiff and others similarly situated, the General Assembly intended by this amendment to make the law applicable to them. For that reason, I would vote to reverse.

I, like the majority, do not reach the constitutional questions raised by plaintiff because they were not reached by the trial court. My vote is based solely on my interpretation of the intent of the General Assembly in the enactment of G.S. 96-8(5) q and G.S. 96-8(6) j, applying

the well-recognized rules of statutory construction that the intent of the legislature controls the interpretation of a statute, . . . and that when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but, to the extent that they are necessarily repugnant, the *latter shall prevail*.

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Highway Commission v. Hemphill, 269 N.C. 535, 538-539, 153 S.E. 2d 22, 26 (1967) (emphasis in original).

PEOPLES SERVICE DRUG STORES, INCORPORATED v. MAYFAIR, N.V.
(MICORA, N.V.), KING INVESTORS, LTD. AND CONSOLIDATED
THEATRES, INC.

No. 8017SC450

(Filed 3 February 1981)

1. Evidence § 32.2; Landlord and Tenant § 6— expansion of theatre in shopping center — tenant's permission not required

In an action to enjoin defendants from constructing an expansion of a theatre in the shopping center where plaintiff's store was located, the trial court did not err in refusing to consider testimony by plaintiff's representative and the original developer of the shopping center concerning the intent of the parties with respect to expansion or alteration of the shopping center and parking spaces, since the lease in question contemplated that in future expansions of the shopping center the landlord would maintain the established ratio of parking space to leasable area; the lease did not require the tenant's consent for future alterations; the oral evidence upon which plaintiff relied was to the effect that the tenant's consent was a prerequisite to any future expansion; and such evidence varied, added to or contradicted the written instrument and was therefore inadmissible under the parol evidence rule.

2. Easements § 7.1— negative easement — parol evidence inadmissible

In plaintiff's action to enjoin the expansion of a theatre in the shopping center where plaintiff leased a store, there was no merit to plaintiff's argument that the lease in conjunction with parol statements of the original parties thereto gave it an easement in the common areas of the shopping center and that as a result it had a veto power over future expansion, since the language in the lease by itself was insufficient to give plaintiff a negative easement in the common areas; a negative easement comes within the statute of frauds and cannot be proved by parol evidence; and the parol testimony of the original parties to the lease was therefore irrelevant to the determination of whether the lease granted plaintiff a negative easement in the common areas of the shopping center.

APPEAL by plaintiff from *Cornelius, Judge*. Judgment entered 11 February 1980 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 5 November 1980.

Plaintiff commenced this action in order to get a preliminary and permanent injunction enjoining defendants from constructing an expansion of the Kingsway Plaza Cinema. This theatre is located

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in the Kingsway Plaza Shopping Center in Eden, North Carolina. It is adjacent to one of plaintiff's stores.

On 16 December 1971, a lease was entered into between Samuel M. Longiotti, d/b/a Plaza Associates of Eden, as landlord, and plaintiff as tenant. The lease was negotiated by Samuel M. Longiotti, the developer of the shopping center and landlord, and James M. Kane as representative of the tenant, plaintiff. The lease consisted of a form prepared by plaintiff. As a result of this instrument plaintiff leased from Kingsway Plaza and Mr. Longiotti its store in Kingsway Plaza Shopping Center. Incorporated into this lease by reference was a site plan of the proposed shopping center in which plaintiff's store was to be located. This site plan contained a legend in its lower right hand corner which stated:

This plot plan shows only the approximate location of the demised premises in the project.

Lessor reserves the right to change the names and location of other tenants, number of rooms, parking arrangements, entrances, service areas, etc. without tenants (sic) written approval, provided total area of project building area, parking area, or store frontage is not substantially altered.

At the time this agreement was executed, the legend on the site plan was scratched through and initialled by Mr. Longiotti and Mr. W. D. Paton, who represented plaintiff. A short form of this lease was recorded in the Office of the Register of Deeds of Rockingham County in Book 685, page 829.

Subsequently, the ownership of the shopping center passed though different hands. At the time of the proposed expansion of the theatre which is the subject of this lawsuit, defendant, Mayfair, N. V. (Micora, N.V.) was the owner of Kingsway Plaza Shopping Center, as it is presently. Defendant, King Investors, Ltd., leases and currently operates the shopping center. Defendant, Consolidated Theatres, Inc., leases and operates the Kingsway Plaza Cinema.

On 4 May 1979, defendant, King Investors, Ltd., notified plaintiff that defendants intended to construct a substantial addition to the Kingsway Plaza Cinema. The theatre would be increased by approximately 6,000 square feet to house three screens instead of

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the single screen which it then housed.

In its complaint plaintiff alleged that the proposed expansion of the theatre was in direct breach of its lease. It claimed this was so for the reason that the expansion would alter the size, configuration, circulation, visibility and means of ingress and egress in the common areas of the shopping center as those common areas were shown upon the site plan which was incorporated in the lease. Plaintiff also claimed that the addition to the theatre, which would protrude into the parking area close by plaintiff's store, would reduce the ratio of parking space to leasable area. An acceptable parking ratio was specified in plaintiff's lease.

The proposed expansion of the theatre would reduce the number of designated spaces in the shopping center by 34. However, as part of the expansion project the landlord proposed to create 95 new designated parking spaces. These would replace the 34 spaces taken, while adding 61 new ones to the total. Some of the new parking spaces would be in front of the shopping center, but the majority of the spaces would be to the side and rear of the shopping center. At the time the expansion idea arose there were no designated parking spaces to the rear of the stores in the shopping center. This area had been used primarily for the loading and unloading of freight.

Mr. James M. Kane and Mr. Longiotti were witnesses at the trial of this matter. These two men were the chief negotiators of the terms of the lease in question. Mr. Kane was plaintiff's real estate manager and as such represented plaintiff in these negotiations. Mr. Kane testified that at the time the lease was negotiated, it was his understanding that the site plan was to be part of the lease. He testified with regard to his intention in striking the legend from the site plan:

My discussion with Mr. Longiotti concerning striking the legend was that it was going to be a deal breaker. If we could not have control over the area, we would not sign the lease. Due to our further distance from the grocery store and the unusual location to the other locations in the center, plus the parcels that were out in the direct front and to the side of our store, large land parcels, one two hundred by two hundred and the other a hundred by a hundred, and we had no control over that marked land of

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others, and we wanted to make sure that the limited parking in front of our store would be reserved or unhindered in the future and serve us well as retail tenants.

Likewise, Mr. Longiotti testified that it was his understanding that the lease was executed subject to the fact that the legend was deleted from the site plan. He intended with the striking of the legend that no further changes would be made in the site plan, nor that any expansion other than that which had already been negotiated would occur without plaintiff's approval. He stated that this particular agreement was bargained for. By striking the legend from the site plan, he intended to surrender his right as landlord to change the name or location of the other tenants, the parking arrangements, entrances, service areas, or exits without the plaintiff's written approval.

The court heard this matter without jury and the findings of fact appearing in its judgment ignored the testimony of both witnesses, Mr. Kane and Mr. Longiotti, as to their intentions in striking the legend from the site plan when executing the lease. The court did cite the last paragraph of paragraph 21 of the lease which reads as follows:

In the event of future development or expansion of the Shopping Center, Landlord agrees that it will maintain the same ratio of parking space to leasable area as is provided herein.

Based upon its findings of fact the court concluded that the lease embodied all of the agreements between the parties with respect to the leased premises; defendant had the right under the lease to expand the shopping center; and the proposed expansion of the theatre and parking area met the requirements and did not violate the terms of the lease. Consequently, the court denied plaintiff's request for a permanent injunction of the construction.

Hudson, Petree, Stockton, Stockton and Robinson, by Dudley Humphrey and Jackson N. Steele, for plaintiff appellant.

Midgett, Page and Higgins, by Keith D. Lembo, for defendant appellees Mayfair N. V. (Micora, N.V.) and King Investors, Ltd.

Berry, Bledsoe, Hogewood and Edwards, by Mark B. Edwards and John V. McIntosh for defendant appellees Consolidated Thea-

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tres, Incorporated.

MORRIS, Chief Judge.

Initially, we note that plaintiff's assignments of error, which are noted in the record, fail to call to the court's attention portions of the record that form the basis of its contentions. Rule 10(c), N. C. Rules App. Proc., requires that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear. Exceptions not listed properly should be deemed abandoned. No exceptions appear in the body of this record. Furthermore, only plaintiff's first assignment of error contains an exception with a page reference. We are aware that the plaintiff's assignments of error, except the first, refer to findings of fact which plaintiff contends the court erroneously failed to make. However, plaintiff should have excepted to the court's findings of fact and placed those which it contends the court should have found in the record. As the record stands, there is nothing contained therein to call our notice to plaintiff's contentions.

Under the authority of Rule 2, N. C. Rules of App. Proc., we may suspend the requirements of the Rules of Appellate Procedure to prevent manifest injustice to a party, or to expedite decision in the public interest. We deem it appropriate to so suspend the rules in this instance. By doing so we do not intend to encourage in the bar a laxity in compliance with the Rules of Appellate Procedure.

[1] Plaintiff maintains that there was uncontradicted evidence before the court which conclusively established that by striking out the legend on the site plan contemporaneously with the execution of the lease, the landlord, Mr. Longiotti, intended to grant to plaintiff the unrestricted right to approve or disapprove of any expansion of the shopping center. This would apply particularly to any expansion into the common areas as shown by the site plan. Plaintiff contends that the court was obligated to find these facts because of the testimony of Mr. Kane and Mr. Longiotti as to their intent when entering into this agreement, as evidenced by their deletion of the site plan.

Apparently, the trial court's reason for excluding the evidence of the intent of the parties to the lease from its findings of fact was that it concluded that the lease embodied all of the agreements

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between the parties with respect to the premises.

Plaintiff contends that the lease and site plan contain ambiguities as to its rights with respect to future expansion. Therefore, the court should have considered the evidence of the parties' intent and found facts consistent with that evidence. Plaintiff argues that this evidence conclusively establishes the rights of the parties to the lease which are in controversy. Plaintiff asserts that the court erred by not making findings of fact based on the parol evidence. Therefore, the court's conclusions of law should be reversed.

North Carolina adheres to the parol evidence rule. This rule encourages stability in written contracts. The parol evidence rule is applicable to leases in much the same manner as it is to contracts. *See Stewart v. Thrower*, 212 N.C. 541, 193 S.E. 701 (1937); *Furniture Leasing v. Horne*, 29 N.C. App. 400, 224 S.E. 2d 305 (1976). In general, the parol evidence rule prohibits the admission of evidence to vary, add to, or contradict a written instrument. *See Robbins v. Trading Post*, 253 N.C. 474, 117 S.E. 2d 438 (1960); *Gas Co. v. Day*, 249 N.C. 482, 106 S.E. 2d 678 (1959). Plaintiff contends that in spite of the parol evidence rule the oral evidence of the parties' intentions should have been considered by the court in this instance, because the written lease was ambiguous as to the rights of the parties with regard to the pertinent issue.

[W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, *it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing*. Accordingly, all prior and contemporaneous negotiations in respect to these elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegations thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent. (Citations omitted and emphasis added.)

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953).

We do not think there is any ambiguity in this lease, with regard to the issue of whether the landlord must get plaintiff's

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consent to alter the configuration of the parking lot in order to accommodate the proposed theatre expansion. The last two paragraphs of paragraph 21 of plaintiff's form lease state:

Landlord agrees and covenants that during the term of this lease it will retain the size of, and (at its expense) maintain in good order and repair, and free from ice, snow and debris, the common areas (parking areas, service areas, sidewalks, circulation areas, and means of ingress and egress) in the Shopping Center, as shown on Exhibit A, and will provide adequate lighting (including the electricity therefor) for said common areas.

In the event of future development or expansion of the Shopping Center, Landlord agrees that it will maintain the same ratio of parking space to leasable area as is provided herein.

The plain import of these passages is that the landlord may alter the configuration of the parking areas of the shopping center, but in so doing it must maintain the original "size" of the parking lot. It must retain the "size" of the parking areas by maintaining the proper ratio of parking space to leasable area. The lease is silent with regard to whether the landlord must have the plaintiff's consent before making any changes. Therefore, such consent is not a prerequisite to alterations the landlord might make in the common areas. The landlord did not agree to retain the shape or configuration of the parking areas, but only their "size." The second paragraph of the quoted terms contemplates the future expansion of the shopping center, but it only requires that the landlord maintain the proper parking ratio in making the changes. Plaintiff drafted this form lease, and had it wanted to possess the power to consent to future alterations in the parking areas it could have included such a power in the lease.

Furthermore, the lease contains a merger clause. Paragraph 30 section (g) states:

This instrument embodies all the agreements between the parties hereto in respect to the premises hereby leased, and no oral agreements or written correspondence shall be held to affect the provisions hereof. All subsequent changes and modifications to be valid shall be by written instrument executed by Landlord and

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Tenant.

This clause is evidence of the intention of the parties to the lease that it constitute their entire agreement, and that conflicting oral agreements should not be allowed to vary its terms.

Fortunately, the court heard the testimony of Mr. Kane and Mr. Longiotti so that all of the oral evidence which plaintiff proposes to offer as the basis for its additional findings of fact is known. This evidence does vary, add to, or contradict the written instrument. The lease contemplates that in future expansions of the shopping center the landlord will maintain the established parking ratio. It says nothing about getting the tenant's consent for future alterations. The oral evidence which plaintiff relies upon is to the effect that the tenant's consent is a prerequisite to any future expansion. Therefore, we hold that the court did not err in disregarding the oral evidence of the intentions of the original parties to the lease. Consequently, the court's failure to find the facts as proposed by plaintiff was not error.

[2] Additionally, plaintiff argues that paragraph 21 of the lease in conjunction with the parol statements of the original parties thereto gives it an easement in the common areas of the shopping center. As a result, it has a veto power over future expansion. Plaintiff cites no North Carolina authority for this proposition. The lease simply states that, "Landlord agrees and covenants . . . it will retain the size of . . . the common areas (parking areas, service areas, sidewalks, circulation areas, and means of ingress and egress) in the Shopping Center, as shown on Exhibit A . . ." This language by itself is insufficient to give plaintiff a negative easement in the common areas. The language merely indicates that the landlord agreed to maintain the "size" of the common areas. The major part of plaintiff's argument rests on the oral statements of Mr. Longiotti as to the parties' intentions.

In North Carolina a negative easement comes within the statute of frauds, and it cannot be proved by parol evidence. *Hege v. Sellers*, 241 N. C. 240, 84 S.E. 2d 892 (1954); *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925); *Simmons v. Morton*, 1 N.C. App. 308, 161 S.E. 2d 222 (1968). Therefore, in the instant case the parol testimony of the original parties to the lease is irrelevant to the determination of whether the lease granted plaintiff a negative easement in the common areas of the shopping center. The lease by

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itself does not give plaintiff a negative easement in the common areas of the shopping center.

The proposed theatre expansion and additions to the parking lot are not in violation of the terms of this lease. Defendant proposes to maintain the size of the parking lot in conformity with the provisions of the lease.

The judgment of the trial court is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

THE NORTH CAROLINA STATE BAR v. STEPHEN A. GRAVES

No. 8010NC SB491

(Filed 3 February 1981)

1. Attorneys at Law § 12—disciplinary action against attorney — sufficiency of evidence to support findings

The evidence supported findings by the Disciplinary Hearing Commission that defendant attorney, in representing a client charged with driving under the influence of alcohol, advised a potential State's witness that his client claimed that the potential witness was driving the car at the time in question, that defendant advised the potential witness either not to appear in court or to plead the Fifth Amendment, and that defendant told the potential witness that his client would not testify against the witness if the witness would not testify against his client.

2. Attorneys at Law § 12— unprofessional conduct — influencing potential adverse witness not to testify — constitutionality of disciplinary rules

Defendant attorney engaged in professional conduct prejudicial to the administration of justice and adversely reflecting upon his fitness to practice law in violation of Disciplinary Rules 1-102(A)(5) and (6) where the attorney, in representing a client charged with driving under the influence of alcohol, advised a potential adverse witness that his client claimed that the witness was driving the car at the time in question, told the witness that the State could not prove who was driving if both the witness and his client remained silent, advised the witness not to testify unless subpoenaed and to plead the Fifth Amendment if subpoenaed, and told the witness that his client would not give testimony which might incriminate the witness if the witness would not give incriminating testimony against his client. Furthermore, application of the Disciplinary Rules against defendant attorney in this case did not violate defendant's rights to due process and equal

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protection.

3. Attorneys at Law § 12— unprofessional conduct — public censure

An order of public censure was not arbitrary and unreasonably harsh punishment for defendant attorney's unprofessional conduct in encouraging a potential adverse witness not to testify against his client in a prosecution for driving under the influence of alcohol in return for an agreement by the client not to give any testimony which might incriminate the potential witness.

4. Attorneys at Law § 12— disciplinary hearing — evidence in mitigation of misconduct

In a disciplinary hearing against an attorney, evidence tendered by defendant attorney purportedly in mitigation of the alleged misconduct was properly excluded since it was irrelevant to the question of whether defendant attorney engaged in misconduct, and since mitigating evidence would be admissible only after the charges of misconduct had been established.

APPEAL by defendant from an Order of the Disciplinary Hearing Commission of the North Carolina State Bar entered 16 January 1979. Heard in the Court of Appeals 13 November 1980.

Plaintiff instituted this action on 2 August 1979 seeking to have disciplinary action taken against defendant, a licensed attorney, for alleged misconduct in violation of plaintiff's Code of Professional Responsibility and of G.S. § 84-28(b)(2). In its complaint, plaintiff alleged that on or about 28 September 1978, defendant, while representing one Teresa Smith on a then-pending charge of driving under the influence of alcohol, approached one Luther Melton Guthrie, a potential State witness, and "attempted to influence him not to testify in said case, or, in the alternative if subpoenaed to give testimony, to go upon the stand but not to testify or to plead the Fifth Amendment to the United States Constitution." Plaintiff further alleged that on or about 12 October 1978, during a telephone conversation, defendant again advised Guthrie either to not testify or plead the Fifth Amendment, and also advised Guthrie that "if he would agree not to give incriminating testimony against Miss Smith, he, the defendant, would see that Miss Smith would not give testimony which might incriminate Mr. Guthrie." Plaintiff then alleged that defendant's conduct violated the Code of Professional Responsibility as it was (1) conduct involving moral turpitude, dishonesty, fraud, deceit, and misrepresentation, in violation of Disciplinary Rules 1-102(A)(3) and (4); (2) professional conduct prejudicial to the administration of justice and adversely reflecting upon his fitness to practice law, in violation of Disciplinary Rules 1-102(A)(5) and (6); (3) conduct by which defendant knowingly

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attempted to use perjured or false testimony and attempted to create a false statement of fact, in violation of Disciplinary Rules 7-102(A)(4) and (5); and (4) conduct by which defendant participated in the creation and preservation of evidence when he knew the evidence was false, and counseled and assisted his client in conduct he knew to be illegal or fraudulent, in violation of Disciplinary Rules 7-102(A)(6) and (7). Defendant answered 28 August 1979 admitting that he was representing Miss Smith on a then-pending driving under the influence charge on or about 28 September 1978, but denying all allegations of misconduct.

After a hearing on 6 December 1979, the Disciplinary Hearing Commission made the following pertinent findings and conclusions:

3. During the month of September, 1978, and following, the defendant was representing Miss Teresa Smith (hereinafter referred to as "Smith") on a criminal charge of D.U.I. of alcohol pending in Beaufort County District Court. Miss Smith was charged with said crime following a one car accident involving Miss Smith's automobile, in which she and one Melton Guthrie (hereinafter referred to as "Guthrie") were injured. Miss Smith was arrested by Highway Patrolman R. L. Hawley at Pungo District Hospital, Belhaven, North Carolina shortly after the accident.

4. On September 28, 1978, the defendant went to a self-service gasoline station where he met Guthrie, who, at the time was an employee of the owner of said station.

5. While engaged in conversation, the defendant advised Guthrie that his client, Miss Smith claimed that she was not driving the car, but that Guthrie was. Guthrie told Graves that he was not driving. The defendant advised Guthrie that it would be her word against his. The defendant advised Guthrie that if he had not been subpoenaed to testify at Miss Smith's trial, to not say anything or plead the Fifth Amendment. The defendant also advised Guthrie that if he, Guthrie would not say anything against Miss Smith, then Miss Smith would not say anything against him. The defendant asked Guthrie to think about it and if he had any questions to call him.

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6. Guthrie reported this conversation to Highway Patrolman Hawley shortly after it took place and Mr. Hawley in turn reported it to the District Attorney, William Griffin. Mr. Griffin sought the assistance of the S.B.I.

7. Agent Lewis Young of the S.B.I. met with Guthrie, took his statement and asked him if he, (Guthrie) would grant Young permission to electronically record a telephone conversation between Guthrie and the defendant. After permission was granted, and after two or more unsuccessful attempts, the defendant was reached by telephone on October 12, 1978 at approximately 9:30 a.m. This conversation was electronically recorded by Agent Young on equipment owned by the S.B.I. and operated by Mr. Young.

In conversation which ensued, Guthrie advised defendant that he had been subpoenaed and asked defendant what it was that he (defendant) wanted Guthrie to do. The defendant advised Guthrie that "... the best thing to do is just to get up there and say nothing.", "just say I take the Fifth Amendment, I don't have to answer." Later in the conversation, the defendant said, "they can't prove that she was driving, they can't prove you were driving, if both of you keep your mouth shut," and asked if Guthrie had an attorney, his answer was "no."

After Guthrie acknowledged that statement, the defendant stated, "Yeah, well, ah, you see I'm not going to let her testify against you if you don't testify against her." "Course, you've got more to lose in this than she does." The defendant's last remark was referring to the fact that Guthrie had previously lost his privilege to drive. Defendant then advised Guthrie to think the matter over and to call an attorney, whom he (defendant) had previously identified. With that, the conversation ended.

...

By contacting a potential State witness in a criminal case, and attempting to influence him with regard to his testimony and suggesting or requesting that he not tes-

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tify, the defendant engaged in professional conduct that was prejudicial to the administration of justice and that adversely reflected upon his fitness to practice law, in violation of Disciplinary Rules 1-102(A)(5) and (6) of the Code of Professional Responsibility of The North Carolina State Bar.

From an order of public censure based on these findings and conclusions, defendant appealed.

H. D. Coley, Jr., for the plaintiff appellee.

Johnson, Gamble, and Shearon, by Samuel H. Johnson, for the defendant appellant.

HEDRICK, Judge.

[1] By his first assignment of error, defendant contends that the Hearing Committee's Finding of Fact No. 5 was not supported by any competent evidence. We disagree. The record contains ample competent evidence that defendant advised Guthrie as indicated in the challenged finding. Guthrie testified that "Mr. Graves said to me that if they do subpoena me, then I should go and not say anything or plead the Fifth or just not show up for court." Guthrie further testified that during the taped telephone conversation, "he [defendant] told me that I should plead the Fifth and not say anything and that if I did not say anything, they wouldn't say anything against me." Guthrie also testified that "I believe Mr. Graves told me that if I wasn't subpoenaed I would not have to go to court. I told Officer Young that I had been told that if I had been subpoenaed, and I did go to court, I didn't have to say anything." Defendant himself testified that Guthrie and Smith had each denied being the driver of the car at the time of Smith's arrest, and that in talking with Guthrie, defendant said that "somebody wasn't telling the truth, and Mr. Guthrie agreed with that, that there could be only one person driving the car at the time of the accident." Defendant also admitted that he told Guthrie, "Well, I'm not going to let her testify against you if you won't testify against her."

Moreover, the recording of the telephone conversation, properly authenticated and admitted into evidence, contains the following exchange between defendant and Guthrie:

GUTHRIE: They've subpoenaed me for court. I was

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wondering what you wanted me to do.

GRAVES: Well, Melton, it's kind of like this. I don't know who is telling the truth about it or not. I don't know. She said you were driving. You say she was driving. If you were driving, of course, they can't make you get up on the stand and say that you were.

GUTHRIE: Yes.

GRAVES: So the best thing to do is to get up there and say nothing.

GUTHRIE: Uh-huh (yes).

GRAVES: Just say, "I take the Fifth Amendment. I don't have to answer." You can see an attorney. Who is normally your attorney.

GUTHRIE: I ain't got no one in particular.

GRAVES: How about Jim Vosburgh? You could just call him up on the phone or see him over there and kind of explain the situation to him.

GUTHRIE: In other words, you want more or less what you were talking to me about today, right?

GRAVES: Yes.

GUTHRIE: Yes, I haven't ever called an attorney or nothing.

GRAVES: You see, Melton, they can't prove who was driving.

GUTHRIE: Uh-huh (yes).

GRAVES: They can't prove that she was driving. They can't prove that you were driving if both of you keep your mouths shut.

GUTHRIE: Okay, well, I ain't fully made up my mind yet, but I thought I'd call you being they'd subpoenaed me and everything.

GRAVES: Yes, well, see, I'm not going to let her testify against you, if you won't testify against her.

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GUTHRIE: Uh-huh (yes).

GRAVES: Of course, you've got more to lose in this than she does.

GUTHRIE: Yes.

GRAVES: Because you have lost your license already, haven't you?

GUTHRIE: Uh-huh (yes).

GRAVES: You think it over, Melton, and contact Jim Vosburgh if you've got any doubts about it.

GUTHRIE: Okay, thank you, sir.

GRAVES: Bye.

Since the challenged finding is supported by competent evidence, that finding is binding on this Court, *North Carolina State Bar v. Combs*, 44 N.C. App. 447, 261 S.E.2d 207 (1980), and thus this assignment of error is without merit.

Defendant next contends, based upon his second assignment of error, that the Hearing Committee erred in making Finding of Fact No. 7 because statements attributed to defendant in that finding were removed from "their clear and unmistakably innocent context." After careful examination of the transcript of the recorded conversation, as quoted above, we are of the view, however, that the finding contains a sufficiently adequate summary of the material portions of the conversation, and that no statements were taken out of context. This assignment of error is meritless.

[2] By his third assignment of error, defendant contends that the Hearing Committee's findings do not support its conclusion that defendant violated Disciplinary Rules 1-102(A)(5) and (6) of the Code of Professional Responsibility. Defendant makes the following arguments: (1) advising Guthrie to plead the Fifth Amendment if subpoenaed to testify or not to appear in court if not subpoenaed is ethical; (2) the cited Disciplinary Rules are not applicable to defendant's conduct; and (3) the cited Disciplinary Rules are unconstitutional as applied to defendant under the Due Process Clauses and the Equal Protection Clauses of the United States Constitution and the North Carolina Constitution. We disagree.

The Disciplinary Rules in question provide as follows:

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(A) A lawyer shall not:

...

(5) Engage in professional conduct that is prejudicial to the administration of justice.

(6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

In the ordinary situation, telling a potential witness to plead the Fifth Amendment if subpoenaed, or to not appear in court if not subpoenaed, would not seem to be unethical. Certainly no disciplinary rule prevents the attorney from informing a potential witness as to his legal alternatives under the circumstances. In this case, however, the evidence tended to show that defendant did not simply inform Guthrie as to his legal rights to plead the Fifth Amendment and not to appear in court unless subpoenaed; defendant also attempted to influence Guthrie, a potential adverse witness, not to testify in order to prevent Miss Smith from being found the driver of the vehicle. By convincing Guthrie and Smith not to testify against each other, defendant would frustrate any prosecution of the case, as relevant evidence as to the identity of the driver would be hidden from view. Conduct by an attorney in influencing a potential witness not to testify by which relevant and material evidence is knowingly concealed at trial has been considered unethical. *See* 40 A.L.R.3d 169. In our view, intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice, and since such conduct raises serious doubts about defendant's desire to bring about a just result in such a prosecution, we think this conduct adversely reflects upon defendant's fitness to practice law.

Defendant's argument as to the constitutionality of the cited Disciplinary Rules as applied to this case is likewise without merit. Citing *Bazemore v. Board of Elections*, 254 N.C. 398, 119 S.E.2d 637 (1961) for the proposition that a provision valid on its face may nonetheless be unconstitutional in its application to the particular case if the provision is administered in an arbitrary or discriminatory manner, defendant argues that the disciplinary rules were arbitrarily applied in this case, since defendant was not put on sufficient notice that his conduct would be unethical. While we agree with defendant's interpretation of *Bazemore v. Board of Elec-*

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tions, *supra*, we disagree that the cited Disciplinary Rules were arbitrarily applied in the present case. Defendant should have known that encouraging a potential adverse witness not to testify would result in hinderance of the proper prosecution of the client's case. Based on any set of evidence similar to that presented at the hearing, one could properly conclude that defendant's actions would indeed be prejudicial to the administration of justice and would adversely reflect on defendant's fitness to practice law. This assignment of error is thus meritless.

[3] Defendant's fourth assignment of error relates to the Hearing Committee's order of public censure. Defendant contends that the order was arbitrary and unreasonably harsh punishment under the circumstances of this case. We do not agree. In the present case, defendant's conduct was determined to be in violation of the North Carolina Code of Professional Responsibility and thus was "misconduct" as defined in G.S. § 84-28(b). Subsection (c) of that section sets forth the various punishments, differing in severity, that can be ordered by the Hearing Committee for misconduct as defined in subsection (b): (1) disbarment; (2) suspension for a period not exceeding three years; (3) public censure; or (4) private reprimand. The punishment ordered for defendant in this case ranks third in terms of severity, and essentially differs from the least severe censure only in that it is a public, rather than private, reprimand. Under the circumstances of this case, defendant was a licensed attorney with four years' practicing experience. Whatever lack of overall experience he might have had from this relatively short period of time was offset by the "sink or swim" method of training to which he was subjected by his former associate, Mr. Scott. Defendant had practiced solely in the Washington, North Carolina, area in a trial practice principally involved with criminal law. The evidence at the hearing before the Hearing Committee tended to show that in representing a client, a client he had represented on prior occasions, in a pending criminal prosecution, defendant approached a potential adverse witness in an attempt to influence him not to testify against his client in exchange for the client's not testifying against the witness. We believe the order of public censure was proper in this case. This assignment of error is without merit.

[4] Defendant's seventh assignment of error is addressed to the court's exclusion of evidence tendered by defendant that would purportedly have been in mitigation of the alleged misconduct and

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would have shown defendant's real intent. Defendant argues that he should have been allowed to testify to the following: (1) that Miss Smith had told him that she had not had any prior driving under the influence charges; (2) the reasons defendant believed Guthrie had admitted that he was driving the vehicle at the time of the accident; and (3) defendant's knowledge of Guthrie's criminal record at the time he investigated the accident. We do not agree. Defendant cites in support of his contention Article IX, § 14(19) of the Rules, Regulations, and Organization of the North Carolina State Bar, which provides:

If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.

This subsection, however, refers to proceedings *after* any charges of misconduct have been established; in the present case, defendant sought the introduction of the excluded evidence *before* any misconduct had been determined by the Hearing Committee, and the record contains nothing as to any attempted introduction of mitigating evidence after the determination of misconduct.

The admissibility of the excluded testimony is thus governed by subsection (17) of § 14, which in pertinent part provides: "In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the superior courts of the State at the time of the hearing." Under those rules, the excluded evidence was irrelevant to the question of whether defendant engaged in misconduct, and the Hearing Committee properly denied its admission. This assignment of error is without merit.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judges CLARK and WHICHARD concur.

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CUBA LEE SMITH, EMPLOYEE, PLAINTIFF, v. CAROLINA FOOTWEAR, INC.,
EMPLOYER, AND TWIN CITY FIRE INSURANCE COMPANY, CARRIER,
DEFENDANTS

No. 8010IC544

(Filed 3 February 1981)

1. Master and Servant § 77— workers' compensation — failure to appeal order — no entitlement to hearing de novo

Plaintiff was not entitled to a hearing *de novo* on her workers' compensation claim where she did not perfect an appeal from the Industrial Commission's order, the only avenue of review open to plaintiff being an application for review based on a change of condition pursuant to the provisions of G.S. 97-47.

2. Master and Servant § 77.1— workers' compensation — injury not work related — no change of condition

Plaintiff was not entitled to an award of compensation based on changed condition where the Industrial Commission made findings of fact supported by competent evidence that plaintiff did not in fact suffer any loss of capacity to work from her work related injury and that such disability as she may presently suffer resulted from an automobile accident not related to her injury at work.

3. Evidence § 50.1; Master and Servant § 93.3— workers' compensation — cause of injury — expert testimony — no necessity for hypothetical question

A medical expert was properly permitted to give opinion testimony as to the cause of plaintiff's pain without the use of a hypothetical question where the opinion was based on the expert's own personal knowledge of plaintiff's condition gained from his examination and treatment of her.

APPEAL by plaintiff from an Opinion and Award of the North Carolina Industrial Commission filed 14 December 1979. Heard in the Court of Appeals 6 January 1981.

On 20 February 1974, Cuba Lee Smith sustained an injury to her right leg in an accident which arose out of and in the course of her employment with defendant Carolina Footwear. Plaintiff was struck on the anterior portion of her right leg below the knee by a 700 pound shoe rack being pushed by a fellow employee. Plaintiff timely filed a claim for worker's compensation with the Industrial Commission on 15 July 1975.

At the hearing of plaintiff's claim, plaintiff testified that subsequent to the injury she had leg and lower back pain, that it hurt her to walk or sit and that she was unable to work. Dr. Menno Pennink, a neurosurgeon who examined plaintiff on 16 September 1975, testified that plaintiff's pain resulted not from the leg injury but

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from a ruptured disc that was probably caused by an automobile accident in which plaintiff was involved on 11 March 1975.

In an opinion and award filed on 3 November 1976 and later affirmed by the full Commission on 10 February 1977, the Commission denied plaintiff's claim and held that plaintiff's back and leg difficulties in 1975 were not in any way caused by or related to the injury by accident arising out of and in the course of her employment on 20 February 1974. Plaintiff did not perfect appeal of the full Commission's order.

On 22 July 1977, plaintiff moved for a rehearing of her claim and for an examination by the Industrial Commission's Medical Examiner. By order of the full Commission, plaintiff's motion was denied but a hearing was allowed for the purpose of determining whether plaintiff had experienced a change of condition under the terms of G.S. 97-47. At this hearing, on 8 May 1978, plaintiff testified that the pain in her leg had increased and that she was forced to use a cane to walk. Dr. Anthony Sainz, a physician specializing in psychiatry and neurology who had examined plaintiff, testified that plaintiff was suffering from peripheral neuropathy of the right leg that could have been caused by the injury sustained on 20 February 1974. Plaintiff also introduced certain exhibits, consisting of a medical report dated 17 August 1977 by Dr. Wahaj D. Ahmad describing an examination of plaintiff, a report dated 19 August 1977 from the x-ray department of Bladen County Hospital, a bone scan report dated 18 October 1977 from the x-ray department of Cumberland County Hospital, and an electrodiagnostic study report dated 13 October 1977 by Dr. Ahmad. Having re-examined plaintiff on motion of defendant, Dr. Pennink testified at this hearing that he found no evidence of peripheral neuropathy and that he did not feel all of plaintiff's symptoms were real.

In an opinion and award filed on 12 April 1979, the Commission found that plaintiff's right leg difficulty was not in any way caused by or related to the injury sustained on 20 February 1974, and that plaintiff had not sustained a change in condition. In an opinion and award of 14 December 1979 the full Commission, with one Commissioner dissenting, affirmed the denial of plaintiff's claim. Plaintiff has appealed from this decision of the full Commission.

Hassell & Hudson, by Charles R. Hassell, Jr., and Robin E.

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Hudson, for plaintiff appellant.

Johnson, Patterson, Dilthey & Clay, by Paul Cranfill, for defendant appellees.

WELLS, Judge.

In her first and second assignments of error, plaintiff contends that the Commission erred in refusing to consider plaintiff's claim based on newly discovered evidence. In order to put these matters in proper perspective, we quote her motion in its entirety:

Now comes the plaintiff in the above-entitled cause and respectfully moves for a rehearing of her claim and for an examination by the Industrial Commission's Medical Examiner, pursuant to G.S. 97-47;

In support of her motion, the plaintiff shows as follows:

1. That the testimony of Dr. Menno Pennick [*sic*] on October 12, 1976, was contrary to prior verbal and written statements given to the plaintiff and third parties;

2. That she was surprised by the testimony of Dr. Pennick, [*sic*] on October 12, 1976, and was afforded no opportunity to impeach his testimony with prior inconsistent statements;

3. That she has written statements submitted by Dr. Pennick, [*sic*] to the Industrial Commission and to Ritter Finance Company which state that she was disabled by her work-related accident of February 20, 1974;

4. That the symptoms of her leg injury of February 20, 1974 are still present and, in fact, have worsened to the extent that same would be apparent upon examination by a competent physician;

5. That she has not experienced pain or other discomfort to her leg as a result of an automobile accident in which she was involved in 1975.

WHEREFORE based upon the foregoing, plaintiff through counsel respectfully requests that she be granted a rehearing of her claim for the reasons stated and that

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she be examined by Dr. A. E. Harer, Medical Director of the Industrial Commission, and that his report be submitted to the Commission.

It would appear from the wording of the motion that plaintiff was seeking a hearing *de novo* on the merits of her claim. The reaction of the Commission indicates that they were uncertain as to plaintiff's intent. Their order of 28 July 1977 treated the motion disjunctively as one to re-open on grounds of newly discovered evidence, which they denied, and as one for a new hearing on change of condition, which they allowed.

[1] We initially address the question of whether plaintiff was entitled to a hearing *de novo*. We hold that she was not. The record shows—and plaintiff admits—that she did not perfect an appeal from the Commission's order of 10 February 1977. Under those circumstances, the only avenue of review open to plaintiff was an application for review based on a change of condition, pursuant to the provisions of G.S. 97-47.¹ The Commission granted plaintiff a further hearing for the purpose of determining whether she had experienced a change of condition. At that hearing, plaintiff was allowed to present all the evidence she offered. This evidence consisted of her own testimony as to changes in her condition since her injury on 20 February 1974, the testimony of Dr. Sainz, the reports of Dr. Ahmad, and the x-ray and bone scan reports from Bladen and Cumberland County hospitals. Because it appears from the record before us that all of this evidence was generated after the Commission's order was entered in the initial hearing, we must assume that at the hearing now under review, Commissioner Rush allowed plaintiff to present or introduce all her "newly discovered evidence." These events and circumstances render plaintiff's first two assignments of error moot or groundless, and they are therefore

¹ §97-47. Change of condition; modification of award. — Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

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overruled.

In two other assignments of error, plaintiff asserts that (1) the Commission erred in denying plaintiff's claim based on a change of condition; and (2) the Commission erred in finding facts which were not supported by competent evidence. We shall discuss these arguments in tandem, but in reverse order. It is not necessary for us to recite in detail the findings made by Commissioner Rush and adopted by the full Commission, but we will summarize them to the extent necessary to resolve the issues. Commissioner Rush accurately recapitulated the testimony and medical findings of Dr. Sainz, culminating in the opinion of Dr. Sainz that since her on-the-job injury, plaintiff had suffered a thirty to forty per cent loss of functional capacity, a thirty per cent loss of use of her right leg, and that these conditions could have been caused by her on-the-job injury. The Commissioner also accurately recapitulated the testimony of Dr. Pennink, whose testimony boils down to his opinion that plaintiff suffered no permanent damage from her on-the-job injury and that such pain or discomfort as she presently may suffer is a result of the disc problem caused by the automobile accident. Plaintiff does not argue that Dr. Pennink's testimony was not competent evidence. On this point, she argues that his testimony was inconsistent and conflicting. We do not find it so; but however that may be, it is not for us to weigh the evidence. That is the function of the Commission, as the trier of fact. In an appeal from an award of the Industrial Commission, the scope of our review is limited. If the findings of fact made by the Commission are supported by competent evidence, we must accept those findings as final. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E. 2d 667, 668 (1980). It is clear that in the case *sub judice*, Commissioner Rush considered and weighed all the competent evidence and resolved such conflicts and inconsistencies as he may have seen in the evidence. We hold that his findings of fact were supported by competent evidence.

[2] We next discuss whether plaintiff is entitled to an award of compensation. It is settled law that it is not the injury itself which is compensable under the Worker's Compensation statute, rather it is the loss of capacity to earn resulting from the injury which entitled the worker to compensation. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967). Where the findings of fact, supported by competent evidence, are that plaintiff did not in fact suffer any loss of capacity to work from her on-the-job injury and that such disabil-

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ity as she may presently suffer resulted from other causes not related to that injury, there can be no conclusion other than that reached by the Commission: Plaintiff's condition, as that term is used in G.S. 97-47, has not changed, and she is not entitled to compensation. We affirm the Commission's conclusions and overrule these assignments of error.

[3] Finally, plaintiff argues that the Commission erred in allowing Dr. Pennink to give opinion testimony, over plaintiff's objections, as to the cause of plaintiff's pain. Plaintiff argues that the facts on which an opinion is based which are not within the knowledge of the witness, such as results of x-rays routinely done to arrive at a diagnosis, must be framed in a hypothetical question. In order to put this issue in proper perspective, we will briefly review the plaintiff's history following her on-the-job injury. Based on her testimony at the original hearing, it would appear that although plaintiff did not lose significant work time immediately following her on-the-job injury, she consulted Dr. J. E. Dunlap on 4 March 1974, about two weeks after her injury, and again on 4 April 1974. She was examined by Dr. O. A. Barnhill on 8 April, 3 June, 11 June and 27 August 1974. She was involved in an automobile accident on 11 March 1975 and returned to work on 13 May 1975. Her last day of work was 12 June 1975. Following her automobile accident, she consulted Dr. Barnhill again, who referred her to an orthopedist, Dr. Joe Meek, who treated her and later referred her to Dr. Pennink.

Dr. Dunlap was not called at the original hearing, but included in that record were the Industrial Commission's attending physician's reports made by Dr. Dunlap 15 March 1974 and 24 April 1974. In his 15 March 1974 report, Dr. Dunlap indicated plaintiff would not incur any loss of work time for her on-the-job injury and he indicated plaintiff's injury would not result in any permanent disability. The record contains a similar report by Dr. Barnhill, which indicates he examined plaintiff on 8 April 1974 and found no permanent disability. Another such report, with the same findings as to disability, was made by Dr. Barnhill dated 10 September 1974. The only medical witness called by plaintiff at her original hearing was Dr. Pennink, who testified as to his examinations and treatment of plaintiff following her automobile accident and gave his evaluation of the cause of her condition at that time as a ruptured disc. He found no injury to her leg.

Plaintiff was re-examined by Dr. Pennink on 27 July 1978. At

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the hearing now under review, Dr. Pennink was called by defendant. Without objection, he testified at length as to his examination of 27 July 1978 and his findings resulting from that examination, which were essentially negative in pathological areas. He concluded his answer as follows:

During my examination of Mrs. Smith, I did not find any evidence of peripheral neuropathy. I didn't think she had peripheral neuropathy. She did complain to me of having back and leg pain at the time of my examination.

At this point, defendant's counsel put the following question:

Q. Did you form an opinion as to the cause of her complaints of leg pain and back pain?

Plaintiff's objection was overruled and Dr. Pennink then gave the following answer:

A. I felt she had a disc problem which at the time was better and not an unusual thing, you see. Sometimes they have more pain coming intermittently, more symptoms or less symptoms. So it was not incompatible at all with my opinion in her case.

Over plaintiff's further objection, Dr. Pennink then proceeded to review in detail his entire medical history, diagnosis, and treatment of plaintiff since 16 September 1975.

Following Dr. Pennink's direct testimony, plaintiff's counsel cross-examined Dr. Pennink at great length, during which cross-examination Dr. Pennink testified in great detail as to his examination of plaintiff, his treatment, and as to his opinion of her condition over the span of these events. In *State v. Holton*, 284 N.C. 391, 397, 200 S.E. 2d 612, 616 (1973), our Supreme Court said:

"It is not required that an expert testify in response to hypothetical questions when the witness has himself examined the person in question and is giving his expert opinion based on facts which he himself had observed." 3 Strong, N.C. Index 2d, Evidence § 49 (1967). See *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967); *Bullin v. Moore*, 256 N.C. 82, 122 S.E. 2d 765 (1961). It is well settled in the law

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of evidence that a physician or surgeon may express his opinion on the cause of the physical condition of a person if based either on facts within the personal knowledge or upon an assumed statement of facts supported by evidence and cited in a hypothetical question. 1 Stansbury's N.C. Evidence, Brandis Rev. § 136 (1973); *Yates v. Chair Co.*, 211 N.C. 200, 189 S.E. 500 (1937); *State v. Stewart*, 156 N.C. 636, 72 S.E. 193 (1911).

See also State v. Taylor, 290 N.C. 220, 229, 226 S.E. 2d 23, 28 (1976); *State v. Griffin*, 288 N.C. 437, 442-43, 219 S.E. 2d 48, 52-53 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *State v. Pearson*, 32 N.C. App. 213, 217, 231 S.E. 2d 279, 281-82 (1977).

We believe that the record makes it clear that Dr. Pennink's opinion was based on his own personal knowledge of plaintiff's condition, gained from his examination and treatment of her. His opinion testimony was therefore competent, and it is clear that from plaintiff's extensive cross-examination of Dr. Pennink, there was ample basis for the Commission to properly determine the weight to be given his testimony. This assignment is overruled.

The order of the Industrial Commission is

Affirmed.

Judges ARNOLD and HILL concur.

GENERAL TIME CORPORATION v. EYE ENCOUNTER, INC.

No. 8026SC555

(Filed 3 February 1981)

**Process § 14.4— foreign corporation — contract made and performed in N. C.
— in personam jurisdiction**

In plaintiff's action to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in N. C., the trial court did not err in denying defendant's motion to dismiss for lack of *in personam* jurisdiction since the evidence tended to show that defendant, from its California office, made an offer to purchase goods from plaintiff by telex directed to plaintiff's facility in Davidson, N. C.; that communication specifically directed plaintiff to confirm the acceptance of the terms of the

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agreement by return wire; plaintiff responded by return wire, agreeing with all terms included in defendant's telex with the exception of the warranty; defendant then sent plaintiff a purchase order and forwarded a check for \$1000 to plaintiff accompanied by a letter stating that defendant was pleased to be doing business with plaintiff; both parties considered themselves to have executed a contract; plaintiff shipped goods from N. C. to defendant in California, some of which were returned to plaintiff in N. C. for repair; and such evidence was sufficient to show that a contract was made in this State so that defendant had sufficient contacts with N. C. to subject it to suit here.

APPEAL by defendant from *Burroughs, Judge*. Order filed 25 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 January 1981.

Plaintiff commenced this suit to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in North Carolina. Plaintiff's complaint, as amended, asserts *in personam* jurisdiction over defendant by virtue of N.C.G.S. 55-145(a)(1) and N.C.G.S. 1-75.4(5)(a) and (d), alleging, *inter alia*, that a contract for purchase of the goods was made and substantially performed in North Carolina. Defendant was served by certified mail, return receipt requested, and received actual notice of the action.

Defendant moved to dismiss the complaint on the ground that the court lacks *in personam* jurisdiction. Both parties submitted affidavits. Upon hearing, Judge Burroughs denied defendant's motion, ruling that the court has statutory basis for jurisdiction over the person of defendant. On request by defendant, the court entered findings of fact, including:

4. Prior to September 30, 1977, William J. Schmitz, Marketing Manager of the Precision Products and Parts Division of plaintiff, and Brad Smith, the western regional sales engineer of the plaintiff, discussed personally, and by telephone, with officers of the defendant the possible purchase of battery movements by defendant from plaintiff. In one or more of these conversations, Mr. Schmitz informed the officers of defendant that the battery movements in question would be manufactured by plaintiff in its plant in Davidson, North Carolina, and invited representatives of the defendant to come to North Carolina to tour and inspect the plant prior to entering into a purchase agreement.

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5. On September 29, 1977, defendant directed a telex to plaintiff at its facility in Davidson, North Carolina, which telex was an offer to purchase battery movements from the plaintiff according to the terms and conditions set forth therein. Defendant's telex to the plaintiff specifically set forth the manner of acceptance by plaintiff as follows: "Seller shall confirm the acceptance of the terms and conditions of this agreement by return wire."

6. On September 30, 1977, plaintiff accepted defendant's offer by sending a telex or telegraph message from its office in Davidson, North Carolina to the defendant, which message was received immediately by the Western Union Telegraph system, to-wit: 12:15 p.m. Eastern Standard Time on September 30, 1977.

7. The sending of the reply telex or telegraph on September 30, 1977 by plaintiff from its office at Davidson, North Carolina was the final act necessary to make a binding contractual obligation between the parties, and that consequently, the contract between the parties was made in the state of North Carolina.

8. On September 30, 1977, defendant directed to plaintiff at its Davidson, North Carolina facility a letter enclosing a check for \$1,000.00 (as previously agreed in defendant's telex offer), and stated therein:

"We are pleased to be doing business with your company and are looking forward to a mutually prosperous relationship. Enclosed please find check from our company which will act as consideration for the agreement made by exchange of wires on September 29th and 30th."

9. Subsequently, defendant directed a written purchase order to plaintiff at its Davidson, North Carolina facility, and sent the same by way of United States mail to plaintiff at its Davidson, North Carolina facility, which purchase order was identical to defendant's original telex offer, except that it acknowledged plaintiff's acceptance of such telex offer by reply telex as follows:

"NOTE: Seller confirmed the acceptance of the

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terms and conditions by return wire.”

10. On several occasions prior to the actual sale and delivery of battery movements, plaintiff received from defendant letters directed to it at its Davidson, North Carolina facility, which letters demonstrate defendant’s contemplation and knowledge that the battery movements in question would be manufactured by plaintiff in Davidson, North Carolina.

....

13. That defendant by virtue of its dealings with the plaintiff as set forth in the affidavits before this Court, promised to pay for services to be performed in the State of North Carolina by the plaintiff, to-wit: the manufacture of battery movements.

The court concluded that it has jurisdiction pursuant to the provisions of N.C.G.S. 55-145(a)(1) and N.C.G.S. 1-75.4(5)(a) and (d), and that exercise of *in personam* jurisdiction does not violate due process principles, as defendant has sufficient minimum contacts with this state. Defendant appeals the denial of its motion to dismiss.

DeLaney, Millette, DeArmon and McKnight, by Ernest S. DeLaney, III, for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman, by Charles V. Tompkins, Jr., and Joseph B.C. Kluttz, for defendant appellant.

MARTIN (Harry C.), Judge.

The sole issue raised on this appeal is whether the trial court erred in denying defendant’s motion to dismiss for lack of *in personam* jurisdiction. Defendant contends that the court’s conclusions sustaining jurisdiction are based on erroneous conclusions of law, unsupported by findings of fact based on the evidence presented. The crux of defendant’s argument is that no contract was made in this state, and absent such a contract, defendant has insufficient contacts with North Carolina to subject it to suit here.

N.C.G.S. 55-145(a) provides the basis for jurisdiction over foreign corporations, which are not transacting business in this state, under four delineated circumstances:

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(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

- (1) Out of any contract made in this State or to be performed in this State; or
- (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or
- (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
- (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

It has been noted: "If one of these four activities is present but the cause of action arises elsewhere, or if none of the four activities is present although others may be present, there is no jurisdictional grant." *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 714 (4th Cir. 1966). See also *Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768 (1980). While the mere act of entering into a contract with a North Carolina resident does not constitute the necessary minimum contacts for the exercise of jurisdiction over a nonresident, *Phoenix America Corp. v. Brisse*y, 46 N.C. App. 527, 265 S.E.2d 476 (1980), a single contract which was *made* or *was to be performed* in this state is sufficient to subject a nonresident corporation to suit under N.C.G.S. 55-145(a)(1). *Goldman v. Parkland*, 7 N.C. App. 400, 173 S.E.2d 15, *aff'd*, 277 N.C. 223, 176 S.E.2d 784 (1970). *Accord, Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Equity Associates v. Society for Savings*,

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31 N.C. App. 182, 228 S.E.2d 761 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977); *Chadbourn, Inc. v. Katz*, 21 N.C. App. 284, 204 S.E.2d 201, *aff'd*, 285 N.C. 700, 208 S.E.2d 676 (1974).

In *Goldman, supra*, this Court reaffirmed the constitutionality of N.C.G.S. 55-145(a)(1) and stated: "[W]here it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established." 7 N.C. App. at 406, 173 S.E.2d at 20. In *Goldman*, the defendant had sent a letter to the plaintiff, a North Carolina resident, which set forth terms of a contract for the plaintiff to act as manufacturer's representative for the defendant. The letter provided that, if the terms were agreeable, the plaintiff should sign and return the original letter. The plaintiff's so doing was held to be the final act necessary to create a binding obligation and the contract was thus held to have been made in this state. Judge Hedrick, speaking for this Court, stated:

For a contract to be made in North Carolina, it must be executed in North Carolina, that is, "the final act necessary to make it a binding obligation must be done in the forum state." [Citations omitted.] The final act in the present case which was necessary to make the agreement a binding obligation, and therefore, a contract, was the depositing of the letter containing the signature of Artie W. Goldman in the mail.

7 N.C. App. at 407-408, 173 S.E.2d at 21. In affirming this decision, our Supreme Court stated: "In the instant case the contract in question clearly met the requirement of 'substantial connection' with North Carolina. It was made in this State." 277 N.C. at 229, 176 S.E.2d at 788. Justice Moore further noted:

[B]y entering into a contract made in North Carolina and to be performed in part in North Carolina, the defendant availed itself of the privilege of conducting its business in this State thus invoking the benefits and protection of its laws, and clearly the North Carolina Legislature, by the express words of the statute authorizing such service on a foreign corporation when the contract was made in North Carolina, sought to give to its courts the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement.

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Id. at 229-30, 176 S.E.2d at 788-89.

The question remaining in the instant case, then, is whether the findings of fact are based upon evidence in the record and whether they support Judge Burroughs' conclusion that the contract was made in North Carolina. "For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Realty Corp. v. Savings & Loan Assoc.*, 40 N.C. App. 675, 677, 253 S.E.2d 621, 624, *disc. rev. denied, appeal dismissed*, 297 N.C. 612 (1979), *appeal dismissed*, 444 U.S. 1061, 62 L. Ed. 2d 744 (1980). *Accord, Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931); *Leasing Corp., supra*; *Goldman, supra*. The record reveals that defendant, from its California office, made an offer to purchase goods from plaintiff by telegraph, or telex, directed to plaintiff's facility in Davidson, North Carolina. That communication specifically directed plaintiff to "confirm the acceptance of the terms and conditions of this agreement by return wire." Plaintiff responded: "Consider this telex a confirmation of your telex of 9-30-77. We agree with all terms included in your telex with the exception of the warranty. Our warranty is 18 months maximum. Cannot accept the 14 months from date of delivery." Defendant then sent plaintiff a purchase order identical to the original order except for this additional notation at the bottom: "NOTE: Seller confirmed the acceptance of the terms and conditions by return wire." Defendant forwarded a check for \$1,000 to plaintiff, accompanied by a letter stating: "We are pleased to be doing business with your company and are looking forward to a mutually prosperous relationship. Enclosed please find check from our company which will act as consideration for the agreement made by exchange of wires on September 29th and 30th."

Despite defendant's affidavits to the contrary, there is ample evidence in the record demonstrating that both parties considered themselves to have executed a contract. Plaintiff shipped goods from North Carolina to defendant in California, some of which were returned to the plaintiff in North Carolina for repair. In its affidavits and its brief on appeal, defendant repeatedly refers to the "contract" in question, submitting that the contract was executed in California. We cannot accept defendant's argument that no valid contract was formed because of the variance in warranty terms. We find that plaintiff's wire constituted a "definite and seasonable expression of acceptance" under N.C.G.S. 25-2-207. *See Realty*

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Corp., supra. The Official Comment to N.C.G.S. 25-2-207 states:

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

The variance in warranty terms does not invalidate the entire contract, and the effect of that variance, with respect to which term controls, is not an issue presently before this Court. We hold that the evidence in the record supports the trial court's findings of fact and conclusions of law.

Defendant further argues that jurisdiction cannot be sustained under N.C.G.S. 55-145(a)(1) because the trial court made no finding of fact that the cause of action arose in this state, citing *R.R. v. Hunt & Sons, Inc.*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Dillon v. Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976), *rev'd on other grounds*, 291 N.C. 674, 231 S.E.2d 629 (1977); *Rendering Corp. v. Engineering Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970); and several federal cases. None of these cases involved a contract made in North Carolina. Furthermore, in *Equity Associates, supra* at 186, 228 S.E.2d at 763, this Court commented that "the broad assertion in *Dillon* that G.S. 55-145 applies only to a cause of action arising in North Carolina is dictum," as *Dillon* concerned a contract neither made nor performed in this state. In any case, it is apparent from the complaint that the present cause of action is based upon the contract discussed above.

The constitutionality of applying N.C.G.S. 55-145(a)(1) when a

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contract was made in this state has been discussed at length by our Courts in numerous prior cases. *E.g., Byham v. House Corp.*, 265 N.C. 50, 143 S.E.2d 225, 23 A.L.R.3d 537 (1965); *Realty Corp., supra*; *Leasing Corp., supra*; *Equity Associates, supra*. We will refrain from repeating those principles. The facts disclosed by the record come within the above holdings. In light of our decision that the contract was made in North Carolina, it is unnecessary to discuss the additional statutory grounds on which plaintiff asserts jurisdiction over defendant.

Affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. MALCOLM KEITH FEARING, III

No. 801SC691

(Filed 3 February 1981)

1. Automobiles § 131.1— accessory after the fact to hit and run driving — sufficiency of evidence

In a prosecution of defendant for being an accessory after the fact to the willful failure immediately to stop a motor vehicle at the scene of an accident and collision resulting in injury or death, evidence was sufficient to be submitted to the jury where it tended to show that a third person, while driving an automobile owned by defendant, struck, injured and killed a named person; the driver knew he had struck a person but did not stop at the scene of the accident; and upon learning that the driver had struck a person and had not stopped, defendant, who was not in the car nor present at the scene of the accident, assisted the driver in avoiding apprehension, arrest, and punishment for such offense.

2. Automobiles § 131.2— hit and run driving — knowledge that person was injured or killed — instruction required

In order to lay the basis for punishment under G.S. 20-182, the State must show that defendant willfully violated G.S. 20-166(a) by failing to stop at the scene of an accident knowing that there was an accident and knowing that a person had been injured or killed in the accident; therefore, in a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court's instruction was erroneous because it gave the impression that, if the accident did involve injury or death to a person, knowledge that an accident had occurred was sufficient to provide the element of willful failure to stop, and did not require a showing of the driver's knowledge of injury or death to a person.

Judge HEDRICK dissenting.

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APPEAL by defendant from *Brown, Judge*. Judgement entered 29 February 1980 in Superior Court, DARE County . Heard in the Court of Appeals 3 December 1980.

Defendant was charged in a bill of indictment with being an accessory after the fact to the willful failure to immediately stop a motor vehicle at the scene of an accident and collision resulting in the injury and death of Cloise H. Creef. Defendant pleaded not guilty, was tried, convicted, and given an active sentence. The facts will be summarized in the body of the opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and McCown & McCown, by Wallace H. McCown, for defendant appellant.

WELLS, Judge.

[1] The offense with which defendant was charged was that he unlawfully, willfully, and feloniously received, harbored, maintained, shielded, comforted and assisted Charles Silsby Fearing to avoid apprehension, arrest, and punishment for the commission of the felony of failure to immediately stop a motor vehicle at the scene of an accident involving injury to and the death of Cloise H. Creef, in violation of G.S. 20-166, commonly referred to as the "hit and run" statute.¹ The State's evidence, viewed in the light most favorable to

¹ § 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.— (a) The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182.

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c),

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the State tended to show that Charles Silsby Fearing, while driving an automobile owned by the defendant, struck, injured and killed Cloise H. Creef and that Charles Fearing knew he had struck a person, but did not stop at the scene of the accident. Upon learning that Charles Fearing had struck a person and had not stopped, defendant, who was not in the car nor present at the scene of the accident, assisted Charles Fearing in avoiding apprehension, arrest, and punishment for such offense. The State's evidence was sufficient to overcome defendant's motion to dismiss and his assignment of error to the trial court's failure to grant such motion is overruled.

Defendant has brought forward twenty-three other assignments of error. In one of these assignments, defendant contends that the trial court erred in failing to properly instruct the jury as to the elements of the offense of hit and run involving injury or death to a person. The portions of the trial court's charge excepted to by defendant were, in pertinent parts, as follows:

For you to find the defendant guilty as an accessory after the fact to the felony of failure to immediately stop a motor vehicle at the scene of an accident involving injury or death, the State must prove beyond a reasonable doubt:

shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle and, provided that if the damaged property is a guardrail, utility pole, or other fixed object owned by the Department of Transportation, a public utility, or other public service corporation to which report cannot readily be made at the scene, it shall be sufficient if the responsible driver shall furnish the information required to the nearest peace officer or make written report thereof containing said information by U.S. certified mail, return receipt requested, to the N.C. Division of Motor Vehicles within five days following said collision. Any person violating the provisions of this subsection shall be guilty of a misdemeanor and fined or imprisoned for a period of not more than two years, or both, in the discretion of the court. (Amended effective 1 January 1981.)

(c) The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182. (Amended effective 1 January 1981.)

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First, that the crime of failure to immediately stop a motor vehicle at the scene of an accident involving injury or death, was committed by Charles S. Fearing, that is to say that the State must prove beyond a reasonable doubt that the 1972 Mercedes was involved in an accident, and that at the time Charles S. Fearing was driving the 1972 Mercedes; that Charles S. Fearing knew of the accident; that Cloice [*sic*] H. Creef was physically injured or killed in the accident; that Charles S. Fearing failed to immediately stop the vehicle at the scene of the accident, and that Charles S. Fearing's failure was wilful, that is intentional and without justification or excuse.

....

So I charge that if you find from the evidence and beyond a reasonable doubt that on or about February 19, 1979, the crime of failure to immediately stop a 1972 Mercedes motor vehicle at the scene of an accident involving injury or death to Cloice [*sic*] H. Creef, was committed by Charles S. Fearing, that is to say that on or about February 19, 1979, Charles S. Fearing, while driving a 1972 Mercedes, was involved in an accident in which Cloice [*sic*] H. Creef was physically injured or killed, and that Charles S. Fearing knew of the accident and wilfully failed to immediately stop at the scene

Defendant argues that the charge is erroneous because it gives the impression that if the accident did involve injury or death to a person, knowledge that an accident has occurred is sufficient to provide the element of willful failure to stop, whereas defendant argues that to establish willfulness it is necessary to show knowledge of injury or death to a person. The State on the other hand argues that if the accident did involve injury or death to a person, a showing of knowledge of an accident only is sufficient to establish as willful the failure of the driver to immediately stop a vehicle at the scene. In order to resolve the question, we must consider G.S. 20-182² as this statute affects the provisions of G.S. 20-166.

² § 20-182. Penalty for failure to stop in event of accident involving injury or death to a person. — Every person convicted of willfully violating G.S. 20-166, relative to the duties to stop or render aid or give the information required in the event of accidents, except as otherwise provided, involving injury or death to a person, shall

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The hit and run statute was first adopted as a part of the Uniform Motor Vehicles Act of 1927.³ The section of the 1927 session laws providing for the penalty for failure to stop in the event of an accident involving injury or death to a person allowed punishment by imprisonment in the State prison, thus making the offense a felony, but it did not contain the requirement that the violation be willful. It thus appears that in its original form, the statute did not require a showing of willful failure to stop, and that under its original form, the State's argument in this case would have been sound, *i.e.*, all that need be shown was knowledge of *an accident* and failure to stop.

In the 1937 session, the General Assembly rewrote the Motor Vehicles Act.⁴ The 1937 Act incorporated the requirement of willfulness with respect to a felony conviction of failing to stop in the event of accidents involving injury or death to a person. Following the enactment of the 1937 Act, the first decision dealing with the aspect of a willful failure to stop after an accident involving injury to a person was *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494 (1948). In *Ray*, the State's evidence showed that defendant, the driver of a large truck, was proceeding along a highway and was met by an automobile proceeding in the opposite direction. When the two vehicles passed, the rear-end of the truck swerved across the center of the road and struck the automobile, causing injuries to a passenger in the car. The truck continued along the highway without reducing its speed or stopping. In reversing the conviction of the truck driver for a violation of G.S. 20-166, Justice Ervin, speaking for the Court, interpreted the requirements of the statute as follows:

be punished by imprisonment for not less than one nor more than five years, or in the State prison for not less than one nor more than five years, or by fine of not less than five hundred dollars (\$500.00) or by both such fine and imprisonment. The Commissioner shall revoke the operator's or chauffeur's license of the person so convicted. In no case shall the court have power to suspend judgment upon payment of costs. (Amended effective 1 July 1980.)

³ See 1927 N.C. Sess. Laws, ch. 148, article II, § 29 and article V, § 61.

⁴ See 1937 N.C. Sess. Laws, ch. 407, article X, § 128 and article XII, § 142. See also 1939 N.C. Sess. Laws, ch. 10 which corrected an inconsistency as to punishment or penalty provided for violation of hit and run involving property damage and violation involving injury or death to a person. See also Note, 17 N.C.L. Rev. 327, 349 (1939).

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It would be a manifest absurdity to expect or require the driver of a motor vehicle to perform the acts specified in the statute in the absence of knowledge that his vehicle has been involved in an accident resulting in injury to some person. Hence, both reason and authority declare that such knowledge is an essential element of the crime created by the statute now under consideration. (Citations omitted.) This position is expressly sustained by our statute prescribing the punishment for persons "convicted of willfully violating G.S., 20-166, relative to the duties to stop in the event of accidents . . . involving injury or death to a person." G.S., 20-182.

In this case, the State itself introduced a statement of the accused to the effect that he had no knowledge or notice that he had struck any motor vehicle or injured any person while driving his truck upon the Henderson-Oxford Highway. If true, this declaration plainly negated the existence of an essential element of the crime charged in the indictment, to wit, that the defendant knew that the truck driven by him had been involved in an accident resulting in injury to a person. The exculpatory statement of the defendant is not contradicted or shown to be false by any other fact or circumstance in evidence. Consequently, we are constrained to hold upon the record here presented that this exculpatory statement is binding upon the State, and that the motion of the defendant for judgment of nonsuit ought to have been sustained in the court below. (Citations omitted.)

State v. Ray, *supra*, at 42-43, 47 S.E. 2d at 495.

The question was again before our Supreme Court in *State v. Overman*, 257 N.C. 464, 125 S.E. 2d 920 (1962), wherein Justice (later Chief Justice) Sharp succinctly stated the requirements for a conviction of G.S. 20-166(a) as follows:

Therefore, in order to convict the defendant on the first count which charged a violation of G.S. 20-166(a), it was necessary for the State to prove that on the occasion in question, the defendant was the operator of the 1957 two-tone green Chevrolet automobile which the State contended drove westerly down Stonewall Street be-

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tween Delaware Avenue and Queen Anne Street; that this vehicle was involved in an accident or collision with Frank E. Nutley; and that knowing he had struck Nutley, the defendant failed to stop his vehicle immediately at the scene. *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494.

(Emphasis supplied.) *State v. Overman*, *supra*, at 467, 125 S.E. 2d at 923.

State v. Coggin, 263 N.C. 457, 139 S.E. 2d 701 (1965), involved a violation of G.S. 20-166(c), which carries with it the identical provisions as to penalty for violation as provided in G.S. 20-182. In *Coggin*, the State's evidence showed that defendant was driving an automobile involved in an accident in which an intoxicated passenger was injured, and that the passenger was unconscious following the accident. We quote the following pertinent portion of that decision:

The defendant further assigns as error the failure of the court below to charge the jury with respect to intent and wilfulness in connection with the violation of the provisions contained in G.S. 20-166(c), which statute provides that a violation of the provisions therein with respect to assistance to an injured person, *et cetera*, "shall be punishable as provided in § 20-182." In G.S. 20-182 it is provided that a defendant convicted of wilfully violating G.S. 20-166(c) may be punished by imprisonment for not less than one nor more than five years in the State prison, or fined not more than \$500.00, or by both fine and imprisonment.

Therefore, we hold that the defendant was entitled to have the trial judge instruct the jury that the burden was on the State to establish beyond a reasonable doubt that the defendant *knowingly or intentionally failed to render reasonable assistance* to his injured passenger, including the carrying of him to a physician or surgeon for medical or surgical treatment *if it was apparent that such treatment was necessary*. *State v. Ray*, 299 N.C. 40, 47 S.E. 2d 494.

(Emphasis supplied.) *State v. Coggin*, *supra*, at 461, 139 S.E. 2d at 703-4.

In *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967), defend-

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ant was convicted of violating G.S. 20-166(a) and (c). The convictions were upheld, but the opinion of the Court contains the following pertinent statement:

The totality of the State's evidence would permit a jury to find that just before the defendant turned over he saw a pedestrian in front of him, that he ran over this pedestrian and inflicted upon him serious injuries, that he must have known that he had been involved in an accident *and had injured this person by striking him with his automobile.*

(Emphasis supplied.) *State v. Glover, supra*, at 322, 154 S.E. 2d at 307.

In *State v. Fearing*, 48 N.C. App. 329, 269 S.E. 2d 245, *cert. denied*, 301 N.C. 99, 273 S.E. 2d 303 (1980), we find the following statement:

To support a verdict of guilty under G.S. 20-166(a), the State must prove that defendant was driving the automobile involved in the accident at the time it occurred; that the vehicle defendant was driving came into contact with another person resulting in injury or death; and that defendant, *knowing he had struck the victim*, failed to stop immediately at the scene. *State v. Overman*, 257 N.C. 464, 125 S.E. 2d 920 (1962). *Knowledge of the driver that his vehicle has been involved in an accident resulting in injury to a person is an essential element of this offense. State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967); *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494 (1948).

(Emphasis supplied.) *State v. Fearing, supra*, at 334, 269 S.E. 2d at 249.

[2] These decisions of our appellate courts clearly establish the requirement that in order to lay the basis for punishment under G.S. 20-182, the State must show that the defendant willfully violated G.S. 20-166(a) by failing to stop at the scene of an accident knowing that there was an accident *and knowing that a person had been injured or killed in the accident*. The cases in the majority of other American jurisdictions appear to agree with this requirement of guilty knowledge of injury to a person. *See Annot.*, 23 A.L.R. 3d 497 (1969).

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Guilty knowledge of injury to a person was a central issue in this case. The driver of the car, Charles Fearing, admitted that the car collided with something, but his testimony and statements were to the effect that due to distractions by a passenger in the car, his eyes were off the road and he did not see what he had hit and did not know he had hit a person. Under this evidence, the defendant was entitled to a clear instruction as to the guilty knowledge of Charles Fearing, not just that Charles Fearing knew there had been an accident and failed to stop, but that he knew the accident involved injury or death to a person. The charge of the trial court did not accomplish this requirement and for this error, defendant is entitled to a new trial.⁵

As the other asserted errors in the trial are not likely to arise again, we do not address them here.

New trial.

Judge MARTIN (Robert M.) concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting:

The identical infirmity in the instructions upon which the majority awards the defendant a new trial was the basis of an assignment of error in *State v. Fearing*, 48 N.C. App. 329, 269 S.E. 2d 245, *cert. denied*, 301 N.C. 99, 273 S.E. 2d 303 (1980) wherein another panel of this Court in an opinion authored by Chief Judge Morris declared the assignment of error to be without merit. I vote to find no prejudicial error.

⁵ We note, as pointed out by the State in its brief, that the charge used by the trial court, so far as it relates to a violation of G.S. 20-166(a) by the driver of the motor vehicle is based upon the North Carolina Pattern Jury Instructions for Criminal Cases, section 271.50.

State v. Thompson

STATE OF NORTH CAROLINA v. LEONA THOMPSON

No. 8029SC615

(Filed 3 February 1981)

1. Embezzlement § 4— embezzlement by city clerk — conviction under appropriate statute

There was no merit to defendant city clerk's contention that her convictions for embezzlement from the City of Saluda were invalid in that she was convicted for violations of G.S. 14-90, which is a private sector embezzlement statute, when she should have been tried for violations of G.S. 14-92, a statute applicable to public officials, since the indictments against defendant did not refer specifically to any statute, they were sufficient to charge defendant with violations of either G.S. 14-90 or G.S. 14-92, and the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute.

2. Embezzlement § 6— fraudulent intent — inference from evidence

Evidence that defendant city clerk wrote salary checks to herself in excess of the amount authorized was sufficient to permit a reasonable inference that defendant fraudulently or knowingly and willfully misapplied the city's funds to her own use without authorization so as to support her conviction of embezzlement.

3. Embezzlement § 6.1— reference in instructions to crime of larceny

The trial court in an embezzlement case did not err in referring in the instructions to the crime of larceny where the court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny.

4. Criminal Law § 118.1— statement of contentions of the parties — equal stress

The trial court in an embezzlement case did not improperly fail to give equal stress to the contentions of the State and of the defendant by taking more time in stating the State's contentions than in stating those of defendant where the sole evidence offered by defendant was character evidence, the State introduced a considerably greater volume of testimony than did the defendant, and the contentions of the defendant were therefore very few in contrast with those of the State.

5. Criminal Law § 117— instructions — effect of character evidence — necessity for request

Since character evidence is a subordinate feature of the case, failure of the court to give an instruction as to how the jury should view character evidence is not error absent a request for such an instruction.

6. Embezzlement § 4— embezzlement indictments — failure to allege specific dates of offenses

Indictments for embezzlement were not invalid because they failed to allege the specific dates on which the offenses occurred but instead alleged that they occurred on or about 1 January of each year for which an indictment was returned since defendant presented no statute of limitations or alibi defense, and

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the time of the offenses was therefore not an essential fact. Furthermore, defendant was not prejudiced by the issuance of one indictment for each year rather than separate indictments for each offense committed during that year.

7. Criminal Law § 58— defendant's signature on checks — competency of witness

The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant where the witness testified that he had seen defendant write her signature on thousands of occasions.

8. Criminal Law § 153— motion for appropriate relief after notice of appeal — jurisdiction

Defendant's motion for appropriate relief pursuant to G.S. 15A-1418 should have been filed initially in the Court of Appeals rather than in the trial court where it was filed after defendant had given notice of appeal.

9. Criminal Law § 138— sentences within statutory maximum

Sentences imposed on defendant upon her conviction of four offenses of felonious embezzlement were within the discretion of the trial court and not excessive where each sentence was less than the statutory limit of 10 years provided by G.S. 14-2.

APPEAL by defendant from *Howell, Judge*. Judgment entered 25 January 1980 in Superior Court, POLK County. Heard in the Court of Appeals 6 November 1980.

Defendant was charged in four bills of indictment with embezzlement of funds from the city of Saluda, in each of the years 1975, 1976, 1977 and 1978. Upon her pleas of not guilty, the State presented evidence tending to show the following:

Defendant was employed as City Clerk by the city of Saluda. Her duties included receiving and collecting municipal funds. All funds of the municipality were administered under her supervision, and she "typed out and signed all the checks." For her services defendant was paid a weekly salary set by the Saluda City Council, and she "was not authorized to take any money from the City . . . in excess of her salary."

Shortly after the State's witness, Cater Leland, became Mayor of Saluda, the city hired a "relief worker" while defendant was on vacation. During this time Leland "noticed some . . . irregularities in the records." He thereupon called in an accountant for a special audit. The accountant who performed the audit, Larry Bonds, testified that he had made a determination "from city records and from

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the Mayor [of] what the normal salary payments to the Clerk should have been" and the salary payments which were in fact "made to the Clerk [and] charged to the general ledger accounts." His determination covering the years 1975-1978 was as follows:

	<u>Authorized Salary</u>	<u>Salary Actually Paid</u>	<u>Overpayment</u>
1975	\$5,304.00	\$5,708.00	\$ 404.00
1976	5,021.10	5,300.90	279.80
1977	6,292.00	8,228.00	1,936.00
1978	4,324.32	5,634.72	<u>1,310.40</u>
		TOTAL OVERPAYMENT	\$3,930.20

The payroll checks payable to defendant during the period 1 July 1974 through 9 February 1978, bearing her signature for the city of Saluda as payor, and which had all been cancelled, were introduced as exhibits by the State.

Defendant's evidence consisted solely of witnesses to her good character and reputation in the community.

The jury returned verdicts of guilty as charged. Judgments of imprisonment were entered thereon, sentencing defendant to "not less than 4 nor more than 7 years" in Case No. 78CRS2171; to "a period of two years" in Case No. 78CRS2172, to run concurrently with the sentence imposed in Case No. 78CRS2171; to "a period of no less than two years nor more than 2 years" in Case No. 78CRS2173, to run concurrently with the sentence imposed in Case No. 78CRS2171; and to "no less than two years nor more than two years" in Case No. 80CRS238, to run concurrently with the sentence imposed in Case No. 78CRS2171. From these judgments of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

The Crosby Law Firm, by Christopher S. Crosby, for defendant-appellant.

WHICHARD, Judge.

[1] Defendant first contends in her brief that her convictions are "void for fatal variance" in that she was tried and convicted for

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violations of G.S. 14-90, which is "a private sector embezzlement statute," when she should have been tried for violations of G.S. 14-92, a statute "applicable to public officials." The indictments against defendant do not refer specifically to any statute, and they are sufficient to charge defendant with violations of either G.S. 14-90 or G.S. 14-92. Both statutes create a felony offense, and the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute. We thus find this contention to be without merit.

[2] As part of the argument under this heading in her brief defendant also contends the State has not met its burden of proof, because it has not produced any evidence of defendant's intent at the time she wrote checks to herself in excess of the amount authorized. It is true that "the criminality of the act depends upon the intent," and therefore the State must "show the intent to defraud beyond a reasonable doubt." *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 701-702 (1935). It is also true, however, that the intent to defraud "may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred." *McLean*, 209 N.C. at 40, 182 S.E. at 702. We find the evidence sufficient to permit a reasonable inference that defendant fraudulently or knowingly and willfully misapplied the city's funds to her own use without authorization. Further, the court carefully instructed the jury that "the property must have been appropriated with a fraudulent purpose"; that "[t]he conversion of funds or property by a person who has been entrusted with them becomes criminal as an embezzlement only by reason of this corrupt intent and it is necessary for the State to establish the intent as a fact independent of the conversion"; and that "this intent must be found by a Jury as a fact from the evidence." This argument is without merit.

[3] Defendant next contends the trial court erred in its instructions to the jury by (1) making reference to the crime of larceny, when defendant was not charged with larceny; (2) not properly summarizing the case and not summarizing the contentions of the parties with equal force; and (3) failing to instruct sufficiently as to how the jury should view character evidence.

As to the contention regarding reference to the crime of larceny, the instruction complained of was as follows:

The object of the statute is to punish the misappropria-

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tion of property rightfully in the possession of the alleged wrongdoer who though civilly liable for a conversion could not be convicted of larceny, because there was no taking from the owner's possession by an act of trespass. The difference, therefore, between larceny and embezzlement is that in larceny there must be trespass while in embezzlement it is not necessary. Both offenses, the act of taking or converting, must be done with a fraudulent intent.

It is evident that the trial court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny. Nothing in this instruction in any way suggests that the defendant could have been guilty of the crime of larceny, and we find in the instruction no error prejudicial to defendant.

[4] As to the contentions regarding summarizing the case and contentions, G.S. 15A-1232, like former G.S. 1-180 (now repealed), does not require the trial court to state the contentions of the litigants; but if the court does so, it must give equal stress to the State and the defendant, and must state the pertinent contentions of both parties. *State v. Hewett*, 295 N.C. 640, 247 S.E.2d 886 (1978). Defendant may not object, however, if the court takes more time in stating the State's contentions than in stating the defendant's, *State v. Sparrow*, 244 N.C. 81, 92 S.E.2d 448 (1956); and the equal stress required "does not mean that the statement of contentions of the State and of the defendant must be equal in length," *State v. King*, 256 N.C. 236, 239, 123 S.E.2d 486, 489 (1962). "[I]n a trial where the evidence for the defendant is short . . . his contentions will naturally be very few in contrast with those of the State [which] may have introduced a great volume of testimony." *King*, 256 N.C. at 239, 123 S.E.2d at 489. Here, the sole evidence offered by defendant was character evidence; and the court adequately instructed the jury that the defendant had offered evidence which she contended tended to show that "according to the opinion of several people who have known her over a period of years, she has a good character and reputation in the community where she lives." The State introduced a considerably "greater volume of testimony" than did the defendant, and the contentions of the defendant were therefore naturally "very few in contrast with those of the State." There is no merit in defendant's contention in this regard.

[5] As to the contention regarding the failure to instruct suffi-

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ciently as to how the jury should view character evidence, the character of defendant was not a substantive feature of the case. "[I]nstructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case." *State v. Hunt*, 283 N.C. 617, 624, 197 S.E.2d 513, 518 (1973). "Evidence of the good character of the defendant . . . is a subordinate and not a substantive feature of the trial and the failure of the judge to charge the jury relative thereto will not generally be held for reversible error unless there be a request for such instruction." *State v. Sims*, 213 N.C. 590, 594, 197 S.E. 176, 178 (1938). No such special request was made here. This contention, too, therefore lacks merit.

[6] Defendant next contends she was "tried with deficient indictments." She argues that: (1) the indictments failed to state an exact amount of money allegedly embezzled; (2) they failed to allege to whom the money belonged; and (3) they failed to allege the specific dates on which the offenses occurred, charging "that the violations occurred on or about 1 January of each year." Our examination of the indictments reveals that each does allege an exact amount of money entrusted to and embezzled by the defendant, and we find the evidence sufficient to sustain convictions for embezzlement of some portion or all of the sums alleged in the indictments. It also reveals that each indictment sufficiently alleges that the sums were held by defendant for or on account of the city of Saluda. Finally, it reveals that defendant correctly asserts that the indictments do not allege specific dates on which the offenses occurred, alleging instead that they occurred on or about 1 January of each year. "The time fixed in a bill of indictment usually is not an essential fact, and the State may prove the crime was committed on another date." *State v. Vincent*, 35 N.C. App. 369, 371, 241 S.E.2d 390, 392 (1978). Because defendant presented no statute of limitations or alibi defense, the time of the offenses here was was "not an essential fact." Moreover, because the State could have obtained a separate indictment for each check drawn by defendant in excess of the authorized amount, the issuance of one indictment for each year rather than for each offense benefited defendant and could not have prejudiced her. This assignment of error is overruled.

[7] Defendant next contends that the trial court erred in numerous evidentiary rulings. She argues at greatest length the impropri-

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ety of allowing the State's witness, Cater Leland, to testify that the signature on the checks introduced as State's exhibits was that of defendant. The basis of her argument is that there was no evidence as to how he came to know defendant's handwriting or as to the basis for his observation that it was hers. We find, however, that the witness had testified that he had seen defendant write her signature and had seen defendant's signature on "thousands" of occasions. Thus, he was competent to testify as to his opinion that the signature on the checks was that of defendant.

[A] witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged . . . may give such opinion in evidence.

Nicholson v. Lumber Co., 156 N.C. 59, 65, 72 S.E. 86, 87 (1911); 2 Stansbury's North Carolina Evidence § 197 at 122 (Brandis Revision 1973). This contention is without merit; and we find no error prejudicial to defendant in her remaining contentions relating to evidentiary rulings. This assignment of error is therefore overruled.

[8] Defendant also moves for appropriate relief pursuant to G.S. 15A-1418. We note that defendant filed this motion for appropriate relief, or a copy thereof, in the Superior Court on 5 June 1980. The trial judge entered an order filed 8 July 1980 denying the motion. This order was entered long after defendant had given notice of appeal, and the trial court thus had been divested of jurisdiction to pass on the motion. G.S. 15A-1448. The motion should have been filed initially in the Court of Appeals. Ultimately it was filed with this Court as part of the record on appeal. Despite procedural error in the filing of the motion, we have considered it; and because we, like the trial court, find it without merit, it is hereby denied.

[9] Finally, defendant assigns error to the sentences entered, contending that they were excessive; that the trial court did not address the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures; and that the sentences were violative of the Constitution of the United States and of the Constitution of the State of North Carolina. "The punishment imposed in a

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particular case, if within statutory limits, is within the sound discretion of the presiding judge." *State v. Garris*, 265 N.C. 711, 712, 144 S.E.2d 901, 902 (1965). The sentence of imprisonment imposed in each case here was less than the statutory limit of ten years. G.S. 14-2. Hence, it was within the sound discretion of the presiding judge; and "[w]hether defendant should be granted relief by way of reduction of the sentences is a matter for decision by the Board of Paroles[now the Parole Commission]." *State v. Gibbs*, 266 N.C. 647, 648, 146 S.E.2d 676, 677 (1966).

Counsel for defendant conceded in oral argument that none of the errors alleged, standing alone, were prejudicial; but he contended that their cumulative effect denied defendant a fair trial. We conclude from our examination of the record, the errors assigned and the contentions of counsel, that defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

REBECCA B. RENFRO d/b/a RENFRO BROKERAGE v. FRANK B. MEACHAM

No. 808SC522

(Filed 3 February 1981)

**Brokers and Factors § 6— real estate broker's action to recover commission —
no triable issue of fact**

In an action by a licensed real estate broker to recover a commission for having procured a prospective purchaser for property owned by defendant in accordance with the terms of a listing agreement between the parties, the trial court properly granted summary judgment for defendant since there was no triable issue of fact as to whether the parties had differing intentions with respect to the property being sold as a unit or in separate parts, nor was there a genuine issue of material fact as to whether defendant failed to cooperate with plaintiff in the selling of the property as required under the listing agreement; furthermore, defendant's refusal to accept either a written or an oral offer tendered on behalf of a prospective purchaser was justified under the circumstances since the terms of the offers differed substantially from the terms of sale in the listing agreement, and the prospective purchaser was therefore not "ready, willing, and able" to purchase on defendant's terms as set out in the listing agreement.

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APPEAL by plaintiff from *Brown, Judge*. Judgment entered 17 December 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 4 December 1980.

This is a civil action in which plaintiff, a licensed real estate broker, seeks to recover a commission for having procured a prospective purchaser for property owned by defendant in accordance with the terms of a listing agreement between plaintiff and defendant. In a complaint filed 12 October 1978, plaintiff, among other things, alleged the following: On or about 20 May 1978, plaintiff and defendant entered into a written agreement, which replaced a similar agreement between the parties dated 23 February 1978, wherein defendant authorized plaintiff to act as his agent in obtaining prospective purchasers for a certain tract of land owned by defendant; pursuant to such authority, plaintiff furnished to defendant several offers to purchase from qualified prospective purchasers solicited by plaintiff; defendant "refused to sell, convey or agree to sell or convey the property listed by the defendant with the plaintiff;" defendant refused to accept any of the offers to purchase tendered by prospective purchasers solicited by plaintiff; plaintiff is therefore entitled to the commission as set forth in the terms of the agreements; and plaintiff has made demand for payment of the commission, but defendant has refused such demand. Plaintiff attached to his complaint two exhibits which he alleged to be copies of the 23 February 1978 and 20 May 1978 agreements.

Defendant filed answer on 20 January 1979, alleging that the complaint failed to state a claim upon which relief could be granted. Defendant admitted that he "signed and delivered" the exhibits purported by plaintiff to be copies of the alleged agreement between the parties; that he has refused to sell or convey the property; and that plaintiff has made demand, which defendant refused, for payment of the commission. Defendant, however, denied the other material allegations of the complaint, and further alleged, among other defenses, the following: Even if there was a valid listing agreement, plaintiff failed to communicate or deliver any offers that would be acceptable under the terms of the agreement; the consummation of a sale is a condition precedent to the payment of any commission, and no sale was consummated; and the writing was not as represented by plaintiff when defendant signed it.

Defendant moved for summary judgment on 2 October 1979. In support of his motion, defendant offered his pleadings, deposi-

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tions of defendant and Rufus R. Kimrey, and the following stipulations between the parties: (1) on 20 May 1978, plaintiff and defendant entered into a "Listing Agreement" under which defendant authorized plaintiff "on the terms and conditions therein stated" to act as defendant's agent in "soliciting and obtaining prospective purchasers for a tract of land owned by defendant;" (2) this agreement "constitutes the only agreement between the parties and was in full force and effect during the period therein stated;" (3) this agreement contains, among other things, the following terms:

3. Sale price. \$1,250,000 for entire property or 550 Acres of open land at \$687,500 or equivalent price per acre and 1088 Acres of woodland at \$562,500 or equivalent price per acre.

4. Terms of Sale. Terms of sale of entire property at \$1,250,000 to be one-half cash at closing, one-half balance in six months, indebtedness to be secured by Deed of Trust or Certif. of Deposit in favor of Seller. Terms for sale of open land to be the same. Terms for the sale of woodland to be cash at closing.

5. Cooperation with Agent. Seller agrees to cooperate with you to facilitate the sale of the property. Property may be shown by appointment made by or through you as Listing Agent.

6. Commission. Seller agrees to pay you a commission if a purchaser is procured by you, your agency during the listing period. Commission shall be computed on the gross sales price of the property. Commission to be 3% (Three Percent);

(4) during the period of this agreement, plaintiff obtained and communicated one written offer for purchase of the subject property, which offer was rejected by defendant; (5) this written offer, from Canal Industries, Inc., in pertinent part provides:

The terms and conditions of the sale and purchase are as follows: The agreed price for said 1638 acres is to be \$1,250,000.00 or equivalent price per acre based on survey to be run at Buyer's expense. The purchase price to be paid as follows: One-half of the purchase price to be paid upon the deliverance of a fee simple deed free from all

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encumbrances for said property. The remaining indebtedness to be paid six months from date of deliverance of deed. Indebtedness to be secured by Deed of Trust during period of said indebtedness.

...

2. Seller and Buyer agree that pro-ration of taxes will be based on closing date.

3. Seller and Buyer shall be responsible for their own attorney's fees and the Seller will pay Revenue stamps.

...

5. It is understood that all earnest money deposits will be held in escrow by the Seller's agent until closing date and;

(5-A) Earnest money to be refunded to Buyer; if offer is rejected by Seller, if title cannot be delivered or in the event Buyer withdraws offer before the Seller's acceptance.

(5-B) The Buyer acknowledges that failure to carry out agreement after Seller's acceptance will forfeit deposit as liquidated damages which are to be paid to the Owner-Seller subject to deductions of the agents [sic] commission;

...

(6) during the period of this agreement, plaintiff obtained and communicated one oral offer for purchase of the subject property, which offer was refused by defendant; (7) this oral offer, also from Canal Industries, Inc., provided that Canal would buy the subject property in its entirety for the listed price, subject to the condition that defendant agree to grant Canal

an option for a stated time of six (6) to nine (9) months for a sum to be agreed upon with the offeror to have the right to survey the premises and elect at the end of the stated time to exercise its option to purchase or to forfeit to the defendant the option price;

and (8) no sale of the subject property was consummated during the

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period of the listing agreement.

Plaintiff offered the stipulations, the deposition of Kimrey, and her own deposition in opposition to defendant's motion. From an order granting summary judgment in favor of defendant, plaintiff appealed.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for the plaintiff appellant.

Biggs, Meadows, Batts, Etheridge & Winberry, by William D. Etheridge, for the defendant appellee.

HEDRICK, Judge.

The sole question presented by this appeal is whether the court erred in granting summary judgment for defendant. G.S. § 1A-1, Rule 56(c) in pertinent part provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Upon a motion for summary judgment, the burden is on the moving party to establish the lack of a triable issue of fact. *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976); *Baumann v. Smith*, 41 N.C. App. 223, 254 S.E.2d 627 (1979). The motion must be considered in a light most favorable to the party opposing summary judgment, *Baumann v. Smith*, *supra*; *Peterson v. Winn-Dixie of Raleigh, Inc.*, 14 N.C. App. 29, 187 S.E.2d 487 (1972), and the papers of the moving party will be carefully scrutinized. *Kidd v. Early*, *supra*; *Baumann v. Smith*, *supra*.

In contending that genuine issues of material fact do exist in the present case, plaintiff first argues that "a material issue of fact obviously exists as to the intent of the defendant in the wording of the listing agreement of May 20, 1978." Plaintiff points out that her deposition indicates that defendant instructed her as to how many acres of woodland and how many acres of cultivated land existed on the subject property, and that defendant not only specified a total price for the property but that he also specified a separate price, or equivalent price per acre, for the "open" or cultivated portion, with

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the remaining part of the total purchase price allotted to the "woodsland" acreage. In contrast, the testimony at defendant's deposition indicates that the 20 May 1978 agreement did not conform to his understanding and that the property was not to be sold other than as a complete unit, thus raising an issue of fact as to how the parties intended the property to be sold. We do not agree. Where the language of a contract is clear and unambiguous, the court is obligated to interpret the contract as written, and the court cannot look beyond the terms to see what the intentions of the parties might have been in making the agreement. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968).

In the present case, the listing agreement clearly and unmistakably indicates that the sales price was to be \$1,250,000 for the entire property, or \$687,500 (or an equivalent price per acre) for the "open" portion (550 acres) and \$562,500 (or an equivalent price per acre) for the "woodsland" portion (1,088 acres). The court cannot therefore look beyond the agreement to see if the parties had differing intentions as to whether the property was to be sold as a unit or in separate parts; the language of the listing agreement obviously indicates that the property could be sold either way. Thus, no issue of fact could possibly arise as to those intentions.

Plaintiff's next argument follows from the first. She contends that based upon the "conflicting statements" of the parties as to whether the property could only be sold as a unit, a factual issue arises as to whether plaintiff was empowered to obtain a purchaser for either the total sales price or for a sales price based upon the amount of "open" or "woodsland" acreage. Since we have determined that the listing agreement is unambiguous and controlling with respect to whether the property could be sold as one unit or in parts, this argument deserves no further attention.

Plaintiff lastly contends a genuine issue of material fact exists as to whether defendant failed to cooperate with plaintiff in the selling of the property as required under paragraph five of the listing agreement. Plaintiff argues in support of this contention that defendant never gave any reasons for his refusal to accept the offers from Canal Industries, Inc. and that she "had a great deal of difficulty in obtaining the cooperation of the defendant in that she was never able to contact him or find him." In our view, however, an issue of fact has not been raised. Plaintiff's complaint made no allegation that defendant "failed to cooperate." The record contains no evidence that defendant made himself unavailable to plaintiff,

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restricted access to the property to prevent plaintiff from showing it, or in any other way hindered plaintiff from performing the duties as set forth in the agreement.

Furthermore, defendant's refusal to accept either the written offer or the oral offer tendered on behalf of Canal Industries, Inc. was justified under the circumstances. While it is true, as plaintiff argues, that a broker is entitled to a commission if he obtains during the period of the agency a prospect ready, willing, and able to purchase the premises on the terms specified by the owner, *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 134 S.E.2d 671 (1964), even if the owner voluntarily fails to comply with his agreement to sell, *Boinn v. Summers*, 249 N.C. 357, 106 S.E.2d 470 (1959), the circumstances of this case clearly indicate that Canal Industries, Inc. was not "ready, willing, and able" to purchase on defendant's terms as set out in the listing agreement. The terms of both the written offer and the oral offer substantially differed from the terms of sale in the listing agreement.

The written offer provided that the sales price for the entire tract of 1638 acres would be "\$1,250,000 or equivalent price per acre based on survey to be run at buyer's expense," while the listing agreement made no provision for an alteration in the sales price of the entire tract if a survey should determine the actual acreage to be different. The written offer also varies from the terms of the listing agreement with respect to the method of payment. Under the written offer, if Canal proceeded under the "equivalent price per acre" clause, it would have to pay one-half of the purchase price at closing, and one-half of the purchase price six months thereafter, regardless of whether the acreage was "open" or "woodsland." Proceeding with a "price per acre" transaction under the listing agreement, however, would dictate a *different* method of payment, i.e., the entire purchase price in cash to be paid at closing, for all "woodsland" acreage. The written offer further was at variance with the listing agreement since the written offer had several provisions that were not mentioned in the listing agreement, e.g., a provision for proration of taxes between Canal and defendant, and a provision that the offeror's [Canal] earnest money deposit would be forfeited to defendant as liquidated damages if the offeror defaulted, subject to a deduction for plaintiff's commission.

The oral offer also varied substantially from the listing agreement. This offer was subject to the condition that defendant grant to

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Canal an option, for a term of six to nine months for a sum to be agreed upon between Canal and defendant, to have the right to survey the premises and elect at the end of the stated time to exercise its option to purchase or to forfeit the option price to defendant. This is, in essence, a counteroffer; nothing in the listing agreement contemplated giving an option to a prospective purchaser, and the listing agreement indicates in paragraph nine defendant's intention to part with the property as soon as he could find a complying buyer: "Seller agrees to give purchaser possession of the property immediately upon closing subject only to existing agricultural[sic] tenancy which expires December 31, 1978." Since this record therefore contains no issue of fact as to whether defendant "failed to cooperate," plaintiff's argument must fail.

After careful examination, we can find no genuine issue of material fact in this record. We note that the listing agreement was prepared on plaintiff's form and it clearly indicates that a commission would be paid by the seller if a *purchaser* were procured. No purchase of defendant's property, however, has taken place. We conclude defendant carried his burden of establishing the lack of a triable issue of fact, and summary judgment for defendant is

Affirmed.

Judges CLARK and WHICHARD concur.

STATE OF NORTH CAROLINA EX REL. HOWARD N. LEE, SECRETARY,
DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY
DEVELOPMENT v. PENLAND-BAILEY COMPANY, INC.

No. 8024SC580

(Filed 3 February 1981)

Statutes § 8.1; Waters and Watercourses § 3.2— Sedimentation Pollution Control Act — land-disturbing activities prior to effective date of statute

Application of the Sedimentation Pollution Control Act of 1973 to prevent erosion and sedimentation of public waters resulting from "land-disturbing" activities which occurred before the statute became effective does not constitute an unlawful retroactive application of the statute since the purpose of the statute is to control erosion and sedimentation rather than only land-disturbing activities. G.S. 113A-51 et seq.

APPEAL by plaintiff from *Ervin, Judge*. Judgment signed 25

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April 1980 in Superior Court, MITCHELL County. Heard in the Court of Appeals 9 January 1981.

Plaintiff instituted this action to compel compliance with the Sedimentation Pollution Control Act of 1973. Plaintiff alleges that defendant operates and maintains a 10-acre tract of land in Mitchell County. In the operation of the property, defendant, or its agents or lessees with the knowledge and consent of defendant, carried out earth moving and filling actions on the property for the purpose of disposing of mining tailings and excess dirt. This constituted a "land-disturbing activity" within the meaning of N.C.G.S. 113A-52(6). Plaintiff further alleges that as a direct and proximate result of this land-disturbing action, erosion is taking place on the property and sediment is being deposited off the property, resulting in siltation of the adjacent North Toe River. Demand has been made on defendant to remedy the situation and defendant has refused to do so.

Defendant did not file an answer, but moved for summary judgment. Defendant filed an affidavit which does not deny any of the factual allegations of the complaint, but states that any land-disturbing activity by defendant or its lessee, Harris Mining Company, was done prior to the effective date of the sedimentation act, 1 July 1973. Therefore, defendant contends it is not subject to the act with respect to the condition of the property in question.

Upon the hearing, plaintiff stipulated that no "land-disturbing activity" within the meaning of the act has occurred on defendant's property since 1 July 1973. The trial court entered summary judgment for defendant, concluding as a matter of law "[t]hat all acts complained of by the plaintiff occurred prior to 1 July 1973 and the Sedimentation Pollution Control Act of 1973 does not apply to land disturbing activities occurring prior to its effective date."

From this judgment, plaintiff appeals.

Attorney General Edmisten, by Assistant Attorneys General James L. Stuart and Daniel C. Oakley, for plaintiff appellant.

Hise & Harrison, by Lloyd Hise, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Defendant, in its motion for summary judgment and by argument and brief in this Court, rests its case solely upon the premise

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that the "land-disturbing activity" on defendant's property happened before the effective date of the Sedimentation Pollution Control Act, and therefore the act is not applicable to the facts of this case. Defendant argues that applying the act to the facts of this case would constitute an unlawful retroactive application of the statute. It further contends that because the "land-disturbing activity" occurred prior to the effective date of the statute, the plaintiff has no authority to regulate the results of that activity. Additionally, defendant argues the act only regulates the "land-disturbing activity" and not any results of that action. Consistent with this position, defendant states that the regulatory provisions of the act cannot be invoked because the land-disturbing activity occurred before the effective date of the act. Invocation of these provisions would constitute a retroactive application of a prospective statute, regulating an accomplished event which was not so regulated when it took place. Defendant relies upon *Un. Pac. R.R. v. Laramie Stock Yards*, 231 U.S. 190, 58 L. Ed. 179 (1913); *In re Mitchell*, 285 N.C. 77, 203 S.E. 2d 48 (1974); *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970); and other cases. These cases illustrate the principle that, ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended retroactive application.

To the contrary, plaintiff's position is that the purpose of the act was to prevent erosion and siltation of public waters. If erosion and siltation continue after the effective date of the statute, it is subject to the act, even though the land-disturbing activity causing it occurred before the statute became effective. Plaintiff contends that applying the regulatory provisions of the act to an existing and continuing erosion and siltation process is not a retroactive application, but rather a prospective application of the act.

To determine the answer to this question posed by this appeal, we look to the statute itself and other materials to find the legislative intent. The name of the act, "Sedimentation Pollution Control Act of 1973," gives the first clue as to the intent of the legislature. It refers to sedimentation control rather than the control of land-disturbing activity. The legislative purpose to control erosion and sedimentation is set out in the preamble of the statute.¹

§ 113A-51. Preamble. — The sedimentation of streams, lakes and other waters of this State constitutes a major

¹ The 1975 amendment added the last sentence.

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pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation. In recognition of the desirability of early coordination of sedimentation control planning, it is the intention of the General Assembly that preconstruction conferences be held among the affected parties, subject to the availability of staff.

The statute makes clear its purpose to control erosion and sedimentation.²

§ 113A-54. Powers and duties of the Commission. — (a) The Commission shall, in cooperation with the Secretary of Transportation and other appropriate State and federal agencies, develop, promulgate, publicize, and administer a comprehensive State erosion and sedimentation control program.

(b) To implement this program the Commission shall develop and adopt on or before July 1, 1974, rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities, which rules and regulations may be revised from time to time as may be necessary.

The legislative history of the act is consistent with the conclusion that it was for the purpose of controlling erosion and sedimenta-

² Subsection (b) was amended in 1979 in a manner that does not affect our purpose here, the determination of the intent of the legislature in its adoption of the act.

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tion, rather than only land-disturbing activities. Senate Resolution 961 of the 1971 General Assembly directed the Legislative Research Commission to study the need for legislation in eight designated areas of environmental concern including the "Prevention and abatement of pollution of the State's waters by sedimentation and siltation, particularly that occurring from runoff of surface waters and from erosion." S. Res. 961, § 1(5), Senate Journal, 1971 Session, A-76.

In response, the Legislative Research Commission reported to the legislature, in part:

(1) Sedimentation from soil erosion and runoff constitutes a major pollution problem in North Carolina's rivers, lakes, and reservoirs.

....

(4) The costs of controlling erosion appear to be small when compared to the benefits to be derived from such control.

....

(8) There is a need for legislation and funds that would empower a state agency to develop state-wide regulations concerning sediment control, to coordinate the erosion control efforts of other agencies, to advise and assist local governments in developing sediment control programs, and to serve as liason with the Environmental Protection Agency for the coordination of state and Federal programs.

1973 Report of the Legislative Research Commission to the General Assembly of North Carolina, Environmental Problems, at 13-14.

The act and its legislative history point unerringly to a determined intent by the General Assembly to control erosion and sedimentation through this legislation. This intent is further demonstrated by the regulations adopted pursuant to the act and codified at Title 15, North Carolina Administrative Code, Chapter 4. The code provides:

EXISTING UNCOVERED AREAS

(a) all uncovered areas existing on the effective date of

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these rules and regulations which resulted from land-disturbing activities and exceed one contiguous acre, and are subject to continued accelerated erosion, and are causing off-site damage from sedimentation shall be provided with a ground cover or other protective measures, structures, or devices sufficient to restrain accelerated erosion and control off-site sedimentation.

15 N.C. Ad. Code 4B.0016(a).

Defendant does not challenge the validity of this regulation but charges that it cannot be applied to the facts of this case, as to do so would result in retroactive application of the regulation. We do not agree. Subjecting the facts of this case to the act does not constitute a retroactive application of the statute and regulations. All the requirements to invoke the act and regulations are met by the facts of this case: the condition of the land directly resulted from land-disturbing activities, the land in question exceeds one acre in size, and the land has been and is experiencing accelerated erosion which is causing damages off the property by silting the North Toe River.

A statute is not necessarily unconstitutionally retroactive where its application depends in part upon a fact that antedates its effective date. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979). Although we hold the application of the act to the facts of this case is not a retroactive use of the statute, defendant has also failed to produce any evidence or argument that the act as applied interfered with any of its vested rights or liabilities. Defendant only makes some vague reference in its brief to its relations with its lessee. We note defendant's brief also states the lease was terminated more than seven years ago. The Supreme Court of the United States, in discussing retroactivity of statutes in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 49 L. Ed. 2d 752 (1976), stated:

[I]t may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not

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unlawful solely because it upsets otherwise settled expectations. [Citations omitted.] This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

Id. at 16, 49 L. Ed. 2d. at 766-67 (footnote omitted). This holding effectively refutes defendant's argument that by applying the act to this case its relations with its lessee are materially affected.

The Court in *Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 59 L. Ed. 1204 (1915), upheld a state statute requiring railroads to construct transverse openings in roadbeds to drain surface waters, even though the roadbed in question was constructed and in use long before the effective date of the statute. The Court pointed out that the railroad was not being penalized for the manner of the construction of the roadbed but because it maintained the embankment on the right-of-way in a manner prohibited by the act. So here, the purpose of the proceeding is not to penalize defendant for the land-disturbing activities, but to proscribe the continuing erosion and siltation from the property.

Similar results were reached in *Samuels v. McCurdy*, 267 U.S. 188, 69 L. Ed. 568 (1925) (continued possession of liquor after passage of statute prohibiting possession); *Lewis v. Fidelity Co.*, 292 U.S. 559, 78 L. Ed. 1425, 92 A.L.R. 794 (1934) (bank bond required by statute held to secure subsequent deposits, holding a state statute is not retroactive merely because it draws upon antecedent facts for its operation); *Reynolds v. United States*, 292 U.S. 443, 78 L. Ed. 1353 (1934) (statute preventing deductions from veterans' pensions for hospital costs); and *People v. Jones*, 329 Ill. App. 503, 69 N.E.2d 522 (1946) (statute requiring plugging of abandoned oil wells).

Were we to adopt defendant's argument, it would create a "grandfather clause" effectively eliminating from regulation all erosion in progress prior to the effective date of the act and continuing thereafter. Such aberrant result cannot survive the declared policy of the legislation.

We hold the learned trial judge erred in entering the summary judgment for defendant, and it is

Reversed.

Judges WEBB and WHICHARD concur.

Arey v. Bd. of Light & Water Comm.

WILLIAM REID AREY, III, AND WIFE, AVA EAGLE AREY v. BOARD OF
LIGHT & WATER COMMISSION OF THE CITY OF CONCORD

No. 8019DC572

(Filed 3 February 1981)

**Municipal Corporations § 21— backup of sewage in home — *res ipsa loquitur*
inapplicable**

In an action to recover damages sustained by plaintiffs when sewage backed up into their home from the sewer system owned and operated by defendant, plaintiffs were not entitled to proceed to trial under the doctrine of *res ipsa loquitur*, since that doctrine does not apply in cases where, as here, there has been no prior notice to the city of defects or malfunctions in the affected portion of the system, as a city does not have exclusive control over a municipal sewer system; users of a public sewer system have regular, recurring, and frequent opportunities to use such system in such ways as may cause sudden blockage of parts of the system; and it is not reasonable to expect a municipality to insure against such events taking place from time to time.

APPEAL by plaintiffs from *Grant, Judge*. Judgment entered 15 February 1980 in District Court, CABARRUS County. Heard in the Court of Appeals 8 January 1981.

In their complaint, plaintiffs alleged that their home was damaged when sewage backed up into the home from the sewer system owned and operated by defendant and that the cause of the sewage back-up was the negligent conduct of defendant in the operation of its sewer system. In paragraph nine of their complaint, plaintiffs also alleged that the doctrine of *res ipsa loquitur* applied to their action because the sewer lines were under the control of the defendant and the damage would not ordinarily have occurred if defendant had exercised proper care.

Defendant moved to strike paragraph nine of plaintiffs' complaint on grounds that the allegations failed to set forth sufficient facts to constitute a cause of action on the theory of *res ipsa loquitur*. The trial judge found that any number of factors could have caused the blockage in the sewer line, and granted the motion to strike.

In its answer defendant denied that it was negligent. Defendant then moved for summary judgment. The affidavits filed by each party established that prior to the date the damage to plaintiffs' home was discovered, there had been no notice of problem or defect regarding the sewer line, and that upon being notified of the damage to plaintiffs' home, defendant promptly cleaned out the obstruc-

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tion. The trial judge granted defendant's motion for summary judgment and plaintiffs have appealed.

Koontz, Horton & Hawkins, by K. Michael Koontz, for plaintiff appellants.

Hartsell, Hartsell & Mills, by W. Erwin Spainhour, for the defendant appellee.

WELLS, Judge.

The sole question presented by plaintiffs in this appeal is whether plaintiffs were entitled to proceed to trial under the doctrine of *res ipsa loquitur*. In order to place this issue in clearer perspective, we will elaborate further on the proceedings in the trial court.

In support of its motion for summary judgment, defendant introduced the affidavit of Don T. Howell, Director of Utilities for the Board, which affidavit contains factual statements pertinent to the issue. Plaintiffs' dwelling is served by a gravity flow sewer line, consisting of a section of four inch line running to a point approximately 80.6 feet beyond plaintiffs' property line, where it enters an eight inch line which runs to an outfall main. Prior to plaintiffs' call on 19 May 1976, the sewer line between plaintiffs' dwelling and the outfall main functioned as designed and intended, and on said date, defendant had no knowledge or information of any defect in the line. Neither plaintiffs nor anyone else contacted defendant prior to 19 May 1976 regarding any problems or defects concerning the line serving plaintiffs' dwelling. Defendant promptly responded to plaintiffs' complaint on 19 May 1976 and found an obstruction in the line approximately 190 feet from plaintiffs' property line. Defendant ran a rod through the line and the obstruction cleared. Defendant does not know what caused the obstruction.

Plaintiffs responded to defendant's affidavit with the affidavit of plaintiff William Reid Arey, III. Mr. Arey's affidavit shows that plaintiffs left their residence at 6:30 p.m. on 19 May 1976 and returned at about 11:30 p.m. At the time they left, there was no problem with their sewer or water system. When they returned, they found that sewage and water had backed up into their commodes and bathtub and had overflowed and damaged property in their residence. Plaintiffs called defendant, who dispatched an employee to plaintiffs' residence. The employee inspected the dam-

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age, departed and returned with a rodding machine. After using the machine on Todd Street at a point approximately 190 feet from plaintiffs' residence, drainage returned to normal.

It thus appears that the facts in this matter are not in dispute. All that remains is the question of whether upon these undisputed facts defendant is entitled to judgment as a matter of law. Our courts have held that it is only in exceptional negligence cases that summary judgment is appropriate, because the rule of the prudent man or other appropriate standards of care must be applied. *See Caldwell v. Deese*, 288 N.C. 375, 380-81, 218 S.E. 2d 379, 382-83 (1975); *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). While we recognize and affirm this general rule as to the propriety of summary judgment in negligence cases, it is nevertheless necessary to properly apply the rule to the facts of each individual case.

In an action for recovery of damages for injury resulting from actionable negligence of defendant, plaintiff must show (1) that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. [Citations omitted.]

Foreseeability of injury is an essential element of proximate cause. [Citation omitted.] It is not required that the injury in the precise form in which it occurred should have been foreseeable but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected. [Citation omitted.] However, the law requires only reasonable prevision and a defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable. [Citations omitted.]

McNair v. Boyette, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972).

Recognizing that defendant was under a duty to plaintiffs to

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exercise reasonable or due care in the maintenance and operation of its sewer system so as to avoid harm or damage to plaintiffs, we then look to the question of whether plaintiffs can show any breach of that duty. The forecast of the evidence derived from the affidavits of the parties indicates that plaintiffs cannot show any specific acts of negligence on the part of defendant. Plaintiffs contend, however, that under the facts of this case, they are entitled to go to the jury under the theory or doctrine of *res ipsa loquitur*; i.e., that from the event itself—blockage of the sewer—there may arise the inference that defendant failed to exercise due care in the maintenance or operation of the sewer system, and that, therefore, in order to make out a *prima facie* case, plaintiffs may substitute this inference for direct acts of negligence which they cannot show.

Plaintiffs concede that they have discovered no direct North Carolina authority for the application of the *res ipsa loquitur* doctrine to the facts of this case, but they have referred us to such authority from other jurisdictions, discussed in an annotation entitled *Res Ipsa Loquitur—Escape of Water*. Annot., 91 A.L.R. 3d 186, at 222-26 (1979). Our examination of these and other authorities indicates that there is a substantial divergence of views among American jurisdictions as to whether the doctrine should apply in sudden sewer obstruction cases. The New York and Washington courts have found the doctrine applicable in such cases either on the basis that the city (owner) had a duty of reasonable inspection and that from a blockage or obstruction, an inference may arise of a failure to reasonably carry out that duty, or, on the basis that the city had exclusive control of the system and had the duty to exercise reasonable care to inspect for defects.

The South Dakota, Utah, Wisconsin, and Wyoming courts have held the doctrine inapplicable in such cases, on the basis of lack of exclusive control by the city. *See also* 8 Am.Jur. P.O.F. 2d, *Municipality's Failure to Maintain Sewers Properly*, at 101 (1976).

We believe those cases which recognize that the city does not have exclusive control over a municipal sewer system provide the most appropriate basis for resolution of sudden blockage cases. Common experience and knowledge requires us to recognize that users of public sewer systems have regular, recurring, and frequent opportunities to use such systems in such ways as may cause sudden blockage of parts of the system, and that it is not reasonable

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to expect the municipality to insure against such events taking place from time to time. We believe that the factual situation in *Mosseller v. Asheville*, 267 N.C. 104, 147 S.E. 2d 558 (1966)¹ is analogous and that the opinion of our Supreme Court in that case supports our position.

We are careful to limit our opinion here to cases involving sudden obstruction, such as the one now before us, where there has been no prior notice to the city of defects or malfunctions in the affected portion of the system. We also note the factual distinction between this case and cases where the evidence (or forecast of evidence, as the case may be) discloses a break in the system, or other evidence from which an inference of design defect or negligent construction might arise.

Plaintiffs' forecast of the evidence indicates that plaintiffs cannot show that defendant had any prior knowledge of the sudden obstruction which resulted in plaintiffs' injury and damage. We hold that these circumstances do not give rise to an inference of negligence on the part of defendant, that plaintiffs are not entitled in this case to rely on the doctrine of *res ipsa loquitur* to go to trial, and that defendant was entitled to judgment as a matter of law.

The judgment of the trial court is

Affirmed.

Judges ARNOLD and HILL concur.

¹ *Mosseller* involved damages caused by a leak in a municipal water line. Justice Lake, speaking for the Court, said:

The reasonable care which is required of the city when engaged in such operation, like that required of a privately owned water company, includes the exercise of ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection. Since the record is silent as to what caused the leak to develop in the water line, the plaintiff, in order to recover from the city as the operator of a system of waterworks, must show that the city was negligent in its failure to take steps to stop the flow of water *after it had actual or constructive notice of the leak*.

(Emphasis supplied.) 267 N.C. at 107, 147 S.E. 2d at 561.

Ingram, Comr. of Insurance v. Insurance Agency

STATE OF NORTH CAROLINA EX REL JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE V. NORTH CAROLINA FARM BUREAU INSURANCE AGENCY, INC.

No. 8010SC602

(Filed 3 February 1981)

Insurance § 1— procurement of errors and omissions insurance — insurer not licensed in N. C. — liability for premium tax

Defendant insurance agency “procured” errors and omissions insurance written by an insurer not licensed to do business in N. C. for various insurance agents in this State and was therefore liable for the premium tax imposed by G.S. 58-53.3 where defendant received data about the errors and omissions insurance program from the insurer, including application and renewal forms, and forwarded the forms to prospective applicants; insureds sent applications for renewals of the insurance to defendant; defendant billed the insureds and collected premiums from them; defendant was billed for the premiums by the insurer, wrote checks for the premiums collected less a 5% commission, and forwarded the checks to the insurer; defendant received many certificates of insurance from the insurer and forwarded the certificates to the agents covered; on occasion defendant returned certificates to the insurer, calling attention to errors or charges; and defendant furnished agents information regarding the cost of an errors and omissions policy, described the available plans, and instructed the agents to let defendant know if they desired such insurance.

Judge ARNOLD dissenting.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 14 February 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1981.

This is an action to collect a 5% tax, plus penalties imposed by G. S. 58-53.3, on premiums collected by defendant on errors and omissions insurance written for various insurance agents between 1 July 1972 and 30 July 1978 and paid to an insurance company not licensed to do business in North Carolina.

G. S. 58-53.3 provides in part:

[W]hen any person *procures* insurance on any risk located in this State with an insurance company not licensed to do business in this State, it shall be the duty of such person to deduct from the premium charged for the policy or policies issued for such insurance five per centum (5%) of the premium and remit the same to the Commissioner of Insurance of the State, . . . (Emphasis

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added.)

At the conclusion of plaintiff's evidence, defendant moved for a dismissal as provided under G. S. 1A-1, Rule 41(b). The trial judge made findings of fact, conclusions of law and determined that the defendant had not procured insurance within the meaning of the statute and denied liability. Plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for plaintiff appellant.

Broughton, Wilkins & Crampton, by Robert B. Broughton and William S. Aldridge, for defendant appellee.

HILL, Judge.

The crux of this case is whether the trial court was correct in concluding that the defendant did not procure insurance within the meaning of G. S. 58-53.3 and in granting the defendant's motion for involuntary dismissal.

The trial judge made the following findings of fact and conclusions of law:

1. The plaintiff, John Randolph Ingram, is the duly elected Commissioner of Insurance for the State of North Carolina, and, pursuant to authority of N.C.G.S. § 58-9(5), is authorized and empowered, through the Attorney General of North Carolina, to institute civil actions for a violation of Chapter 58, North Carolina General Statutes.

2. The defendant, North Carolina Farm Bureau Insurance Agency, Inc., [hereinafter Agency] is a corporation organized and existing under and by virtue of the laws of the State of North Carolina.

3. Prior to 1972 Sequoia Insurance Company issued to American Agricultural Insurance Company, Inc. an "Errors and Omissions" master group insurance policy number EL-20-10-11.

4. Neither the Sequoia Insurance Company or the American Agricultural Insurance Agency, Inc. are licensed to do business in North Carolina.

5. During the period January 1, 1972, to December 31,

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1978, and prior thereto, either Charles Houck or Paul Lancaster, both employees of the North Carolina Farm Bureau Mutual Insurance Company, Inc. (not a party to this action) received inquiries from sales agents of the North Carolina Farm Bureau Mutual Insurance Company, Inc., regarding the availability of errors and omissions insurance coverage for their agencies located in various parts of North Carolina.

6. Upon receiving the inquiries from the sales agents either Mr. Houck or Mr. Lancaster would, upon request, forward to said sales agents information regarding errors and omissions insurance coverage available from American Agricultural Insurance Agency, Inc.

7. During the period of time from January 1, 1972, to December 31, 1978, the defendant had no paid employees, salespersons or claim adjusters nor was there any evidence that anyone involved with the defendant was a licensed agent for the defendant, Sequoia Insurance Company, or American Agricultural Insurance Agency, Inc.

8. During the period of time from January 1, 1972, to December 31, 1978, neither the defendant nor anyone involved with defendant had the power or authority to bind coverage or countersign policies of errors and omissions insurance on behalf of American Agricultural Insurance Agency, Inc. [hereinafter AAIAI] or Sequoia Insurance Company under policy number EL-20-10-11.

9. During the period of time from January 1, 1972, to December 31, 1978, the defendant did not adjust any claims under errors and omissions insurance policy number EL-20-10-11.

10. During the period of time from January 1, 1972, to December 31, 1978, the defendant did not receive written applications for insurance under errors and omissions policy number EL-20-10-11.

11. During the period of time from January 1, 1972, to December 31, 1978, the defendant was not selling, binding coverage, or attempting to solicit the purchase of

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errors and omissions coverage under policy number EL-20-10-11.

12. While the defendant, through a manager or administrator, transmitted premiums *and other data concerning the errors and omissions coverage* between sales agents of the North Carolina Farm Bureau Mutual Insurance Company, Inc. and [AAIAI], *defendant's role was administrative or ministerial* in nature. (Emphasis added.)

Based on the above findings of facts the court makes the following conclusions of law:

1. During the period of time of January 1, 1972, to December 31, 1978, the defendant did not procure insurance, under policy number EL-20-10-11 on any risk located in North Carolina with an insurance company not licensed to do business in North Carolina.

2. The defendant is not liable for the premium tax imposed by N.C.G.S. § 58-53.3 for any premiums which might have been paid for errors and omissions insurance coverage under policy number EL-20-10-11.

Appellee contends that in the context of an involuntary dismissal, the trial court's findings of fact are conclusive if supported by any competent evidence, "even though there is evidence to the contrary." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 320, 182 S.E.2d 373 (1971).

We do not quarrel with appellee's statement of the law, but do question the trial judge's conclusions. A conclusion or inference of law by the trial court is reviewable, even though the trial court denominates it a finding of fact. *Warner v. W & O, Inc.*, 263 N.C. 37, 40, 138 S.E.2d 782 (1964).

Finding of Fact No. 12 acknowledges that the defendant, through a manager or administrator, transmitted premiums and data concerning the errors and omissions coverage between the sales agents of the North Carolina Farm Bureau Mutual Insurance Company, Inc., and AAIAI. The "finding" goes on to conclude that defendant's role was merely administrative or ministerial. Hence, we must look to the record to see whether the acts of defendant in

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transmitting premiums and data were such acts as constitute procurement. We conclude they were.

We do not find the word "procure" defined in the insurance statutes. Webster's International Dictionary defines the word as meaning "... to take care of, to bring about, to obtain."

We find "procure" defined in the case of *Marcus v. Bernstein*, 117 N.C. 31, 34, 23 S.E. 38 (1895), a non-insurance case, as meaning

'to contrive, to bring about, to effect, to cause.' Webster Dict. Procure means action

The record shows that Agency was formed for the purpose of placing those types of insurance or those particular risks of insurance which North Carolina Farm Bureau insurance agents cannot place with the North Carolina Farm Bureau Insurance Company (hereinafter Company). Agency has officers, but no employees, so that any work done by Agency is done by employees of Company. For the use of their employees, Company charges Agency a management fee.

Agency administered the errors and omissions program in North Carolina, receiving a broker's commission constituting 5% of the premiums collected. Prior to 1975, Mr. Houck administered the errors and omissions program. Subsequent to that date, Mr. Lancaster, Associate Director of Sales for Company, administered the plan. The salaries of both Houck and Lancaster were paid by Company.

The record further shows that Agency received data about the program from AAIAI, including application and renewal forms, and forwarded them to prospective applicants. Although the trial judge found that Agency did not *receive* written applications for insurance, we find evidence in the record that insureds *sent* applications for renewals of insurance to the defendant. More importantly for purposes of our analysis, the record unequivocally shows Agency billed the insureds and collected premiums from them. In turn, Agency was billed for premiums by AAIAI, received premium calculation sheets from AAIAI, wrote checks for premiums collected, less 5% commission retained, and forwarded the checks to AAIAI.

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The record shows that on occasion Agency received many certificates from AAIAI written on its master policy with Sequoia and forwarded the certificates of insurance to the agents covered. On occasion, Agency returned certificates to AAIAI, calling attention to errors or charges. On other occasions, Agency acknowledged to agents receipt of their requests for information regarding the cost of an errors and omissions policy and described to the applicants the available plans with instructions that, "If you want the insurance, either Plan #1 or Plan #2, all you need to do is let me know, and specify the plan desired."

The performance of defendant Agency, as outlined, involves action, and action is an element of procurement. The trial judge erred in his conclusion that defendant did not procure errors and omissions insurance with an insurance company not licensed to do business in North Carolina, and, therefore, was not liable for the premium tax imposed by G. S. 58-53.3.

We have examined the remaining assignments of error, but do not address them since they may not arise on a subsequent trial of the case.

The decision of the trial court is

Reversed and remanded.

Judge WELLS concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

The majority opinion is grounded in reason. However, I feel that the trial court's findings are conclusive here, and moreover that its conclusion of law is correct. No doubt, a *procurement* occurred within the plain meaning of the verb "procure." However, as the term "procure" is used in our statutes, I disagree with the majority finding that the defendant procured the insurance. It seems to me that either AAIAI or Sequoia procured the insurance in question. Any confusion as to who procured the insurance might be cleared up, and a better result effected, if the General Assembly were to amend the statute and provide for a tax on the *collection* of premiums paid to companies not licensed to do business in North Carolina.

Foster v. Winston-Salem Joint Venture

IRENE B. FOSTER v. WINSTON-SALEM JOINT VENTURE, A GENERAL PARTNERSHIP; JACOBS, VISCONSI & JACOBS COMPANY; CENTER RIDGE CO.; BELK-HENSDALE COMPANY OF FAYETTEVILLE, N.C., INC.; SEARS, ROEBUCK AND COMPANY; AND J. C. PENNEY PROPERTIES, INC.

No. 8022SC542

(Filed 3 February 1981)

Negligence §§ 50.1, 57.11— assault and robbery in mall parking lot — liability of mall owners for failure to provide adequate security

Plaintiff's complaint was sufficient to state a claim for relief against the owners of a shopping mall where it alleged that plaintiff was kicked, beaten and robbed by two assailants when she returned to her car in the mall parking lot and that her injuries were proximately caused by defendant owners' negligent failure to provide adequate security for the mall parking lot. However, plaintiff's evidence on motion for summary judgment was insufficient to show that defendant owners knew that a dangerous condition existed as a result of criminal activity in the parking lot or that a dangerous condition with regard to assaults had existed long enough for defendant owners to have discovered it, and summary judgment was properly entered for defendant owners, where the evidence tended to show that plaintiff was assaulted at a parking spot relatively close to the door of a department store rather than in a remote area of the lot, there were 36 reported criminal incidents at the mall in the year prior to the assaults on plaintiff, only six or seven of those criminal incidents can be characterized as assaults on a person, and most of the incidents involved larceny of goods from a car or larceny of car parts.

Judge ARNOLD concurs in the result.

Judge WELLS dissenting.

APPEAL by plaintiff from *Hairston, Judge*. Judgment entered 29 January 1980 in Superior Court, DAVIE County. Heard in the Court of Appeals 6 January 1981.

This case is before this Court on appeal by plaintiff from a judgment granting defendant's motion for summary judgment and dismissing plaintiff's action under Rule 12(b)(6).

Mrs. Irene Foster, plaintiff in this case, was assaulted in the parking lot of Hanes Mall shopping center. The mall is owned by defendants.

Plaintiff had driven to the mall on 20 December 1976 to do some Christmas shopping and had parked her car very near the entrance of Belk's Department Store. Plaintiff entered the mall, did some shopping, and then returned to her car around dusk. As

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plaintiff was entering her car, she was assaulted from behind by two men who violently pushed her into her car, and then pulled her out, knocking her to the pavement. The assailants then brutally kicked and beat plaintiff and robbed her. After the attackers left, plaintiff crawled into Belk's Department Store and reported the attack.

Plaintiff brought action against defendants, claiming that her injuries were proximately caused by defendants' negligent failure to provide adequate security for the mall parking lot.

Hutchins, Tyndall, Bell, Davis & Pitt, by Richard D. Ramsey and Fred S. Hutchins Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by James M. Stanley Jr. and Allan R. Gitter, for defendant appellee.

HILL, Judge.

We find that the trial judge erred in dismissing the case pursuant to Rule 12(b)(6). No motion by defendants to dismiss for failure to state a claim can be found in the record. The error is harmless, however, because matters outside the pleadings were considered, and the trial judge correctly granted summary judgment in favor of defendants pursuant to Rule 56. We make the rather technical point above because we feel it is important to stress that *if* a 12(b)(6) motion had been made and considered solely on the pleadings, plaintiff could have stated a cause of action if the facts alleged could have been proven.

The RESTATEMENT (SECOND) OF TORTS, § 344 (1965), is illustrative of the position taken by eminent, modern legal scholars on the duty of a shopping center to protect a business invitee from criminal attack.

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the ... intentionally harmful acts of third persons . . . , and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done

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Comment f to § 344 goes on to suggest that if a shopping center owner knows from past experience that he should reasonably anticipate criminal conduct on the part of third persons directed toward his invitees, he may be under a duty "to provide a reasonably sufficient number of servants to afford a reasonable protection."

It is clear that a landowner is not an insurer of the safety of his invitees, *Graves v. Order of Elks*, 268 N.C. 356, 358, 150 S.E.2d 522 (1966), and we are aware of no North Carolina case that has held a landowner responsible for protecting his business invitees from the criminal acts of third parties. The reasoning, of course, is that the criminal acts of third parties are entirely unforeseeable. See *Williams v. Mickens*, 247 N.C. 262, 100 S.E.2d 511 (1957); *Toone v. Adams*, 262 N.C. 403, 137 S.E.2d 132 (1964).

Such reasoning, however, when applied to modern times in a shopping center setting where large amounts of money and merchandise are exchanged and numerous people with no apparent purpose in being at the shopping center nonetheless loiter about, is fallacious.

This Court, in finding that plaintiff has stated a cause of action, does not believe it is taking a pioneering step. Rather, the Court feels that it is entirely consistent with the mainstream of North Carolina law to hold landowners responsible for protecting their business invitees from the foreseeable criminal action of third parties. Our Supreme Court held in *Aaser v. Charlotte*, 265 N.C. 494, 499, 144 S.E.2d 610 (1965), that

In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity . . . arises from the act of third persons, . . . the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it. (Citations omitted.) (Emphasis added.)

We hold, then, that plaintiff has stated a cause of action. The next question we must ask is whether defendants, by the exercise of due diligence, knew that a dangerous condition existed as a result of criminal activity in the parking lot or that such a dangerous condition had existed long enough for defendants to have discovered it.

We find that no dangerous condition existed. Summary judg-

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ment in favor of defendants was properly granted by the trial court.

“When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion.” *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970). Plaintiff’s answer to interrogatories shows that in the year prior to her assault, twenty-eight reported crimes took place in the Hanes Mall parking lot. Defendants’ own evidence indicates there were thirty-six reported criminal incidents at the mall in the year prior to plaintiff’s assault. One woman was kidnapped from the lot on or about 17 September 1975 and later raped. Of the number of criminal incidents, six or seven can be characterized as assaults on a person. The standard incident was larceny of goods from a car or larceny of car parts.

At first blush, the number of incidents during the year preceding plaintiff’s assault would indicate that defendants knew a dangerous condition existed in their parking lot as a result of criminal activity. We cannot say, however, that the numerous petty larcenies in the 76-acre parking lot should have placed defendants on notice that a dangerous condition with regard to assaults existed. Neither can we say that six or seven assaults in such a large and heavily trafficked area gave defendants knowledge of a dangerous condition, especially when the evidence shows that plaintiff was assaulted at a parking spot relatively close to the door of Belk’s Department Store, rather than in a remote area of the parking lot.

For the reasons stated above, the action of the trial judge in granting summary judgment in favor of defendant is

Affirmed.

Judge ARNOLD concurs in the result.

Judge WELLS dissents.

Judge WELLS dissenting.

I believe the reasoning and logic of our Supreme Court in *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977) requires a different result from that reached by the majority. In the case *sub judice*, plaintiff was able to show that there were frequent and repeated occasions of serious criminal acts on the premises of this particular shopping center. As the majority points out, there were at least thirty-six reported criminal incidents at the mall in

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the year preceding the assault upon plaintiff. The record discloses that in the six months prior to 20 December 1976, there were at least twelve such serious incidents, and that in the month of December, 1976, prior to the date on which plaintiff was assaulted, there had been four such incidents, one of which was an assault on a customer and one of which was a robbery of a customer. The robbery took place in the mall, only one day before plaintiff was assaulted and robbed.

I believe this evidence, when viewed in the light most favorable to plaintiff and treated so as to give her the benefit of every reasonable inference to be derived from it, is sufficient to establish the element of foreseeability of harm to plaintiff from criminal activity on the premises of this shopping center. Our courts have held that it is only in exceptional negligence cases that summary-judgment is appropriate, because the rule of the prudent man or other appropriate standards of care must be applied. *See Caldwell v. Deese*, 288 N.C. 375, 380-81, 218 S.E. 2d 379, 382-83 (1975); *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). While the circumstances and facts underlying plaintiff's action may present a novel question of law, I do not believe them to be sufficiently exceptional to take this case out of the rule, and therefore the case should go to the jury.

STATE OF NORTH CAROLINA v. KEVIN MICHAEL TILLET AND STATE OF
NORTH CAROLINA v. CHESTER WARDELL SMITH, JR.

No. 801SC717

(Filed 3 February 1981)

1. Arrest and Bail § 3.4— warrantless detention of defendants — officer's reasonable suspicion of criminal activity

There was no merit to defendants' contention that an officer did not have reasonable suspicions based upon definite facts that defendants were engaged in or had engaged in criminal conduct when he stopped their vehicle, where the evidence tended to show that, while in the course of his duties, the officer saw defendants in their vehicle on a one-lane dirt road in a heavily wooded, seasonably occupied area; the hour was late, and the weather was rainy; the officer knew that the dirt road led to a number of seasonal residences, only one of which was occupied at that time of year; the officer also was aware of reports of "firelighting" deer in that area on several previous occasions; after seeing defendants' vehicle go into the wooded area, the officer left for a short time, and when he

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returned, defendants' vehicle was coming out of the wooded area; and these facts, together with the reasonable inferences to be drawn therefrom, would justify the reasonable suspicion that the occupants of the vehicle might be engaged in or connected with criminal activity.

2. Searches and Seizures § 34— warrantless search of vehicle — contraband in plain view

Defendants' Fourth Amendment rights were not violated by a warrantless search of their vehicle where an officer had probable cause to suspect that defendants might be engaged in criminal activity; the officer was merely investigating defendants' activity in an area of seasonal residences when he shined his light into their vehicle and inadvertently saw what he, an experienced law enforcement officer, perceived to be a marijuana cigarette; and contraband was thus in plain view subject to lawful seizure; furthermore, given the cigarette in plain view, the gray plastic film container on the ground next to one defendant's foot, and the defendants' response of "yes" when asked if anything was in the vehicle, the trial court's findings clearly established a probability that other contraband was contained in the vehicle, therefore justifying the warrantless search of the vehicle in which the balance of the contraband was discovered and seized.

APPEAL by defendants from *Cornelius, Judge*. Judgments entered 20 February 1980 In Superior Court, DARE County. Heard in the Court of Appeals 6 January 1981.

Defendants were charged in proper bills of indictment with felonious possession of marijuana. On 19 February 1980, defendant Tillett and defendant Smith each filed a motion to suppress evidence obtained at the time of their arrest. After a hearing, the trial judge made findings which, except as quoted, are summarized as follows: On 13 November 1979, at approximately 9:40 p.m., Patrolman Wagoner of the Kill Devil Hills Police Department was patrolling alone when he entered Nags Head Woods, a "heavily wooded" area containing summer cottages, with only one such cottage occupied at that time of the year. This particular area was also inhabited by deer, and reports of "firelighting" deer in the area had been filed on previous occasions. It was raining and the roadway into Nags Head Woods was a "one-way dirt road, two cars having difficulty passing. . . ." Upon entering this area, Wagoner met a black Camaro automobile containing two males. Wagoner did not observe an inspection sticker on the vehicle. Wagoner continued on for "five or six miles, his intention was to allow the vehicle to go to the occupied dwelling should he choose to do so. . . ." Wagoner then turned around and "met the same vehicle coming out of Nags Head Woods . . ." and Wagoner "stopped in front of the vehicle with his lights on. . . ."

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Wagoner

approached the vehicle, asked the driver of the vehicle what he was doing and at that time he shined his flashlight into the vehicle and the driver informed him they were just riding; that upon shining his flashlight into the vehicle, he observed a white piece of paper folded up like a cigarette with a bulge in the center partially smoked on the console of the vehicle. . . .

Based on his training and experience, Wagoner formed an opinion that "it was marijuana," and he then told the driver he was going to have to search the car. No request for permission to search was made. Wagoner reached in and pulled out a sawed-off cue stick, and he noticed defendant Tillett "make a move through the rear glass of the vehicle." Wagoner "heard a noise three or four seconds later as he walked to the rear of the vehicle and saw a gray plastic film container on the ground near Mr. Tillett's foot. . . ." Wagoner picked up the container, unscrewed the cap, and found rice and some plastic cellophane. Upon unwrapping the plastic, Wagoner found "a small purple pill" and then Wagoner conducted a search of both defendants. Wagoner "asked if anything was in the vehicle and the response was 'yes' . . ." and Wagoner then found two "roaches" in the ashtray, a nine-inch fishing knife beside the seat, a twenty-five pound grocery bag containing "three plastic bags of green vegetable material" on the floorboard behind the driver's seat, a glass vial and another film container. Defendants were placed under arrest, and the next day Wagoner observed that the black Camaro did have a Virginia inspection sticker located in the center of the front windshield.

Based on these findings, the trial judge concluded that Wagoner had "reasonable suspicions based upon definite facts that the defendants were engaged in or had engaged in criminal conduct;" that Wagoner had "legal justification" to be where he was; that "the rolled cigarette appeared in plain view and based upon past experience and training . . . there was a reasonable suspicion that there was a connection between the items and criminal behavior;" that the discovery of the items was "inadvertent;" and that Wagoner "did not know the location beforehand and had not intended to seize them." Based upon the findings and conclusions, the trial judge denied defendants' motions to suppress, and thereafter both defendants pleaded guilty. From a judgment imposing a prison sentence,

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which was suspended, of “not less than two years nor more than three years” for defendant Smith, and a judgment imposing a prison sentence of “not more than two years” for defendant Tillett, defendants appealed pursuant to G.S. § 15A-979(b).

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Kellogg, White & Evans, by Thomas N. Barefoot, for the defendants appellants.

HEDRICK, Judge.

[1] Defendants first contend, based on their first, second, fourth, fifth, seventh, and ninth assignments of error, that the trial court erred in denying their motions to suppress because the findings of fact made by the trial judge after a hearing on the motions do not support the court’s conclusion that “Officer Wagoner had reasonable suspicions based upon definite facts that the defendants were engaged in or had engaged in criminal conduct” when he stopped defendants’ vehicle. We disagree. Generally, in deference to the Fourth Amendment prohibition against unreasonable “seizures,” before a police officer can conduct an investigatory stop and detention of an individual, the officer must have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979). This protection has been extended to occupants of automobiles. *Delaware v. Prouse*, 440 U.S. 648, 59 L.Ed. 2d 660, 99 S.Ct. 1391 (1979) (at least articulable and reasonable suspicion that occupants or vehicle somehow subject to seizure for violation of law). See, e.g., *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, cert. denied, 444 U.S. 907, 62 L.Ed.2d 143, 100 S.Ct. 220 (1979); *State v. Greenwood*, 47 N.C. App. 731, 268 S.E.2d 835 (1980). Therefore, in examining whether the officer’s conduct was proper in this situation, we must examine both the objective and articulable facts known to the officer at the time he determined to approach and investigate the activities of the occupants of the vehicle, and the rational inferences which the officer was entitled to draw therefrom. *State v. Thompson*, *supra*.

Relying on the findings made by the trial judge, which are supported by competent evidence and thus conclusive, *State v. Prevette*, 43 N.C. App. 450, 259 S.E.2d 595 (1979), upon what facts

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and inferences were the officer's actions based? While in the course of his duties, Officer Wagoner saw defendants in their vehicle on a one lane dirt road in Nags Head Woods, a heavily wooded, seasonably unoccupied area. The hour was late, approximately 9:40 p.m., and the weather was rainy. The officer knew that the dirt road led to a number of seasonal residences, only one of which was occupied at that time of the year. The officer also was aware of reports of "firelighting" deer in that area on several previous occasions. After seeing defendants' vehicle go into the wooded area, the officer left for a short time, and when he returned, defendants' vehicle was coming out of the wooded area. To infer from these facts that the occupants of the vehicle were engaged in some sort of criminal activity, such as "firelighting" deer or burglarizing the unoccupied dwellings, would clearly not be unreasonable. These facts, together with the reasonable inferences to be drawn therefrom, when viewed through the eyes of an experienced police officer, would, we believe, justify the reasonable suspicion that the occupants of the vehicle might be engaged in or connected with criminal activity. The findings of the trial judge do therefore support the conclusion challenged by these assignments of error, and Officer Wagoner acted within the limits of the Fourth Amendment in making the investigatory stop of defendant's vehicle. These assignments of error have no merit.

[2] Defendants next contend, based on their third, sixth, eighth, and ninth assignments of error, that the court erred in denying their motions to suppress since the evidence was seized pursuant to a warrantless and thus unconstitutional search of their vehicle. Defendants argue that the court's findings do not support a conclusion that the warrantless search was justified under any of the exceptions to the Fourth Amendment prohibition against warrantless searches. We disagree.

These assignments of error purport to be based upon an exception to a finding of fact that "at the time [when vehicle searched] each defendant was placed under arrest . . ." and to the conclusions of law that "the rolled cigarette appeared in plain view . . ." and that "the discovery of the items was inadvertent and that the officer did not know the location beforehand and had not intended to seize them." We note at the outset that defendants do not argue that the evidence does not support the findings of fact made by the trial judge on their motions to suppress. Whether the statements by the

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trial judge that the cigarette was “in plain view” and that “the discovery was inadvertent” are finding of fact rather than conclusions of law, is of no significance. In any event, the findings made are supported by the evidence.

“It is basic that, subject to a few specifically established exceptions, searches conducted without a properly issued search warrant are *per se* unreasonable under the fourth amendment, *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967), . . .” *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556 (1979). One such exception is the “plain view” doctrine, under which a law enforcement officer may properly seize evidence in plain view without a search warrant if the officer has prior justification for the intrusion onto the premises being searched, other than observing the object which is later contended to have been in plain view, and the incriminating evidence must be inadvertently discovered by the officer while on the premises. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022, *rehearing denied*, 404 U.S. 874, 30 L.Ed.2d 120, 92 S.Ct. 26 (1971); *State v. Williams*, 299 N.C. 529, 263 S.E.2d 571 (1980). Another exception was discussed by this Court (Morris, Chief Judge) in *State v. Greenwood*, *supra*:

The law is settled in North Carolina that a law enforcement officer may conduct a warrantless search of an automobile if the officer has a reasonable belief that the automobile contains contraband materials. [citations omitted] Such probable cause to search is established where, from the surrounding circumstances, there exists at least a “probability” that contraband substances are contained within the vehicle. [citation omitted]

Id. at 741, 268 S.E.2d at 841.

As pointed out above, Officer Wagoner was justified in stopping defendants’ automobile and detaining defendants. The findings made by the trial judge demonstrate that the officer was merely investigating defendants’ activity in Nags Head Woods when he shined his light into the vehicle and inadvertently saw what he, an experienced law enforcement officer, perceived to be a marijuana cigarette. Contraband was thus in plain view subject to lawful seizure. Furthermore, given the cigarette in plain view, the gray plastic film container on the ground next to defendant Tillett’s foot and the defendants’ response of “yes” when asked if anything

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was in the vehicle, the findings clearly establish a "probability" that other contraband was contained in the vehicle, therefore justifying the warrantless search of the vehicle in which the balance of the contraband was discovered and seized. The findings of fact made by the trial judge support the conclusion that defendants' Fourth Amendment rights were not violated by the warrantless search of the vehicle under the circumstances of this case, and these assignments of error are without merit.

The court did not err in denying defendants' motions to suppress. The judgment appealed from is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

MEMORIAL HOSPITAL OF ALAMANCE COUNTY, INC. v. JIMMIE L. BROWN AND VIRGINIA R. BROWN

No. 8015DC605

(Filed 3 February 1981)

1. Rules of Civil Procedure § § 41, 52— dismissal of action — necessity for findings

The trial court erred in granting defendant husband's motion for an involuntary dismissal under Rule 41(b) where the judgment contained no findings of fact but only conclusions of law; moreover, it would have been better for the trial court to delay ruling on defendant's Rule 41(b) motion until the close of all the evidence rather than at the close of plaintiff's evidence.

2. Evidence § 48— opinion evidence as to reasonableness of hospital charges — exclusion error

In an action to recover the value of general hospital services rendered by plaintiff to defendant wife, the trial court erred in refusing to allow plaintiff's credit manager to give his opinion as to whether plaintiff's charges for defendant wife's care and treatment were reasonable, since the witness testified that he served as credit manager for plaintiff for four years, was familiar with plaintiff's schedule of charges, was familiar with schedules of charges for hospital services approved by Blue Cross-Blue Shield and the federal government, and was familiar with the procedures used by plaintiff in determining the amount owed by patients, and the witness thus showed that he had, through experience, acquired such skill that he was better qualified than the jury to form an opinion on the particular subject of his testimony.

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3. Husband and Wife § 1— contract for hospital services — necessity of hospitalization

In an action to recover the value of general hospital services rendered by plaintiff to defendant wife, the trial court's conclusion that plaintiff had failed to show that defendant's hospitalization was necessary was erroneous, since the only medical witness testified that her hospitalization was necessary, and plaintiff alleged in its complaint that the services provided by it to defendant were necessary for her health and well being, and defendant admitted these allegations, thus foreclosing any issue of fact as to the necessary aspect of the services provided her.

4. Husband and Wife § 1— husband's duty to support wife

A husband is liable for the cost of his wife's necessary medical care.

APPEAL by plaintiff from *Cooper, Judge*. Judgment entered 20 March 1980 in District Court, ALAMANCE County. Heard in the Court of Appeals 13 January 1981.

Plaintiff, a private non-profit hospital, brought this action against defendants, Jimmie L. Brown and Virginia R. Brown, seeking recovery of the value of general hospital services rendered to Virginia R. Brown between 5 August and 24 August 1979. Plaintiff alleged in its complaint that Virginia Brown specially requested the services rendered, that such services were necessary for Virginia Brown's health and well-being, that Virginia Brown executed a written contract whereby she agreed to pay plaintiff for all charges incurred as a result of her admission and treatment by plaintiff, and that the value of the services provided by plaintiff to Virginia Brown was \$2,752.45. Plaintiff also alleged that on the day of Virginia Brown's admission to the hospital, the defendants were living together as husband and wife. Plaintiff sought to establish defendants' joint and several liability.

In her answer, defendant Virginia Brown admitted all of plaintiff's allegations except that she had specially requested the plaintiff's services. As a further defense, defendant Jimmie Brown alleged that the defendants separated on 2 August 1979 and have not lived together as husband and wife since that date. Defendant Jimmie Brown also alleged that defendant Virginia Brown entered plaintiff hospital without his permission or consent, that plaintiff delivered its services and extended credit to defendant Virginia Brown alone, and that Jimmie Brown was without knowledge sufficient to form a belief as to the actual services provided to Virginia Brown or the value of those services.

At trial plaintiff produced the testimony of plaintiff's credit

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manager, Charles Cockman, and defendant Virginia Brown's physician, Dr. John Blake, as well as a number of exhibits including Virginia Brown's medical records, her signed request for admission and authorization for treatment, and her final itemized hospital bill indicating total charges for services between 5 August and 24 August 1979. Mr. Cockman testified that he was responsible for ascertaining the correctness of the charges at the time of final billing, that Virginia Brown's final bill was correct, and that Virginia Brown was charged at the standard rate. Dr. Blake testified as to the treatment and services provided to Virginia Brown while she was hospitalized and that in his expert opinion such services and treatment were necessary for her health. Dr. Blake identified the various services provided to Virginia Brown and testified that the charges for such services, other than surgery, were reasonable.

At the close of plaintiff's evidence, the trial judge, sitting without a jury, granted defendant Jimmie Brown's motion for an involuntary dismissal under Rule 41(b). From this judgment, plaintiff appeals.

Ernest J. Harviel for plaintiff appellant.

Wiley P. Wooten for defendant Jimmie L. Brown.

North State Legal Services, Inc., by Alexa H. Jordan, for defendant Virginia R. Brown.

WELLS, Judge.

At the close of plaintiff's evidence, the trial judge entered the following judgment quoted in its entirety:

This cause coming on to be heard before the undersigned Judge without a jury upon Motion by Defendant at the close of plaintiff's evidence, pursuant to Rule 41 of the Rules of Civil Procedure, for failure to show a right to relief; and the Court, having heard the evidence, finds as a fact that the plaintiff's evidence fails to establish the reasonableness and necessity of a sum certain for medical expenses incurred by the defendant, Virginia R. Brown, and the plaintiff's evidence further fails to establish the reasonableness and necessity of identifiable medical services incurred by the defendant, Virginia R. Brown.

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WHEREFORE, based upon the foregoing findings of fact, the Court concludes as a matter of law that the Motion of Defendant, Jimmie L. Brown, should be allowed.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Judgment of Dismissal be entered against the plaintiff and that it be taxed with the cost of this action.

G.S. 1A-1, Rule 41(b) provides in pertinent part as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

G.S. 1A-1, Rule 52(a) provides in pertinent part as follows:

(a) *Findings.*--

- (1) In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon . . .

[1] The background, rationale, requirements, and proper application of these rules of Civil Procedure have been clearly and succinctly set out by this Court in *Joyner v. Thomas*, 40 N.C. App. 63, 251 S.E. 2d 906 (1979). The judgment of the trial court in the case *sub judice* contains no findings of fact, only conclusions of law. The trial court having failed to make the necessary findings, we must vacate and remand for a new trial. We note for emphasis the instructions of this Court in *Joyner*, as to the appropriate time for ruling on a Rule 41(b) motion to dismiss: "It has been said repeatedly that it is the better practice for the trial court to take the alternative presented by the Rule and 'decline to render any judgment until the close of all the evidence.'" *Joyner v. Thomas, supra*,

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at 65, 251 S.E. 2d at 908.

[2] There were other errors in the trial. Plaintiff offered the testimony of its credit manager, Charles Cockman, who identified a copy of Virginia Brown's hospital bill. Cockman testified that he served as credit manager for plaintiff for four years, was familiar with plaintiff's schedule of charges, was familiar with schedules of charges for hospital services approved by Blue Cross-Blue Shield and the Federal government, and was familiar with the procedures used by plaintiff in determining the amount owed by patients. Upon objection by Jimmie Brown, the trial court refused to allow Cockman to give his opinion as to whether plaintiff's charges for Virginia Brown's care and treatment were reasonable. Opinion testimony is competent if there is evidence to show that through experience the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony. The criterion is this: On this subject can a jury receive appreciable help from this witness? The test is a relative one, depending on the particular witness with reference to that subject, and is not limited to any class of persons acting professionally. *Maloney v. Hospital Systems*, 45 N.C. App. 172, 262 S.E. 2d 680 (1980). We hold that this witness was competent to give his opinion as to the reasonableness of the charges made by plaintiff for the treatment and care of Virginia Brown and that it was error for the trial court to exclude this testimony.

A similar error occurred when the trial court refused to allow Dr. John Blake, Virginia Brown's personal physician and a psychiatrist, to give his opinion testimony as to the reasonableness of the surgical charge portion of Virginia Brown's bill. Dr. Blake's qualifications and experience clearly qualified him to give such opinion testimony. *Maloney v. Hospital Systems*, *supra*.

[3] The trial court's conclusion that plaintiff had failed to show that Virginia Brown's hospitalization was necessary was erroneous. The only medical witness was Dr. Blake, who testified that her hospitalization was necessary. Additionally, we note that in its complaint, plaintiff alleged that the services provided by it to Virginia Brown were necessary for her health and well-being. In her answer, Virginia Brown admitted these allegations, thus foreclosing any issue of fact as to the necessary aspect of the services provided her. See *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E. 2d 640 (1976); *Ragsdale v. Kennedy*, 22 N.C. App. 509, 207 S.E. 2d 301

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(1974), *reversed on other grounds*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

[4] Although the question was not directly treated in the order of the trial court, we note for clarity that defendant Jimmie Brown, as Virginia Brown's husband, would be liable for the cost of her necessary medical care. *Bowes v. Bowes*, 43 N.C. App. 586, 589, 259 S.E. 2d 389, 392 (1979), *disc. rev. denied*, 299 N.C. 120, 262 S.E. 2d 5 (1980); 2 Lee, N.C. Family Law, § 132, at 129 (1980).

For the reasons stated herein, there must be a

New trial.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. HUGH WARNER HARRELL

No. 806SC685

(Filed 3 February 1981)

1. Intoxicating Liquor § 15— possession of intoxicating liquor for purpose of sale — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for illegal possession of intoxicating liquor for the purpose of sale in violation of G.S. 18A-7 where it tended to show that defendant had in his constructive possession more than four liters of liquor with an alcoholic content of greater than 21%. G.S. 18A-7(a)(2); G.S. 18A-2(12).

2. Intoxicating Liquor § 12— possession of intoxicating liquor for purpose of sale — evidence of possession of beer and wine

In a prosecution for illegal possession of intoxicating liquor for the purpose of sale, testimony concerning beer and wine found at defendant's home was competent as tending to show that defendant's possession of the intoxicating liquor was for the purpose of sale.

3. Intoxicating Liquor § 20— possession of intoxicating liquor for purpose of sale — no fatal variance between citation and verdict

There was no fatal variance between a citation charging defendant with "possession of tax-paid whiskey for the purpose of sale -- G.S. 18A-7 -- that whiskey being intoxicating liquor" and a verdict finding defendant guilty of "possession of intoxicating liquor for the purpose of sale," since the reference in the citation to "tax-paid whiskey" was merely surplusage, and it is obvious that the jury found defendant guilty as charged.

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4. Criminal Law § 163—alleged errors in charge — necessity for placing entire charge in record

A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it.

APPEAL by defendant from *Tillery, Judge*. Judgment entered during 18 February 1980 session of Superior Court, HERTFORD County. Heard in the Court of Appeals 2 December 1980.

Defendant was charged with possession of tax-paid whiskey, "that whiskey being intoxicating liquor," for the purpose of sale in violation of G.S. § 18A-7. From a jury verdict of guilty and the imposition of a prison sentence of twelve months, defendant appealed.

Attorney General Edmisten, by Associate Attorney William R. Shenton, for the State.

Carter W. Jones, by Donnie R. Taylor, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant contends, based upon his first and second assignments of error, that the court erred in denying his motions to dismiss the charge against defendant. The State offered evidence at trial tending to show the following: On 26 May 1979, Calvin Pearce, a law enforcement officer with the Hertford County Alcoholic Beverage Control Board, obtained a search warrant for the purpose of searching the premises at 516 North Maple Street in Ahoskie, North Carolina for "illicit spirits and intoxicating liquor." At approximately 8:45 p.m. Pearce, along with several other officers, took the warrant to the specified address, and when they knocked on the back kitchen door, a "lady's voice said, 'Come in'." Upon entering, the officers served the warrant on defendant and one Verlene Riddick. Defendant was standing in the middle of the room, and Riddick was sitting at the kitchen table along with two men. A "big bottle," "almost half gallon," of Inver House Scotch was sitting on the table in front of Riddick, and another bottle of Inver House Scotch and a bottle of Smirnoff Vodka were also sitting on the table, along with cups in front of each person and several other empty cups. Each of the cups had "an odor of alcohol." Two or three "tubes of small cups" approximately three ounces in size were also on the table. Some of the officers went into an adjacent bedroom and

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found "about four liters of Inver House Scotch, Canada Dry Bourbon, and Smirnoff Vodka." Defendant and Riddick were placed under arrest, and Pearce asked defendant "whose room it was that the liquor was in and he stated it was his bedroom, . . ." Defendant further stated that "everything belonged to him with the exception of the bottle sitting in front of Verlene Riddick on the table."

The officers also found fourteen cans of beer, about one liter of wine, and "approximately an eighth of a liter" of Gilbey's Gin in the refrigerator, but no "Pepsi-Cola, Coca-Cola, Ginger Ale or any mixers" were found there. Upon looking into a "20 gallon, galvanized-type" garbage can beside the back door, Pearce discovered "approximately thirty-five or forty or maybe fifty" empty beer cans, a large number of three ounce cups, and "as many as three or four" empty half-gallon bottles of Inver House Scotch. While the officers were at the house, four or five people came to the back door, and "[t]hey would knock on the door, and come in and then ask if they could leave."

The liquor found by the officers was determined to be tax-paid liquor purchased from nearby Alcoholic Beverage Control stores, and the liquor taken from the bedroom "did not have the seals broken." The liquor was also determined to be 80 proof, or forty percent (40%) alcohol, and the total liquor found was approximately six and five-eighths (6 $\frac{5}{8}$) liters, of which four and three-fourths (4 $\frac{3}{4}$) liters were in defendant's possession.

G.S. § 18A-7 in pertinent part provides:

(a) It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession for the purpose of sale, except as authorized by law, any intoxicating liquors; and proof of any one of the following facts shall constitute *prima facie* evidence of a violation of this section:

...

(2) The possession of more than four liters of spirituous liquors at any one time, whether in one or more places; . . .

We think it is clear that the evidence is sufficient to require submission of the case to the jury, and to support the verdict. De-

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fendant had in his constructive possession more than four liters of liquor with an alcoholic content of greater than twenty-one percent (21%); thus, he was in constructive possession of more than four liters of "spirituous liquors." G.S. § 18A-2(12). Thus, the evidence establishes a *prima facie* case of a violation of the statute. This assignment of error is without merit.

[2] Defendant's third assignment of error relates to the court's permitting the admission of testimony as to the presence of beer and wine in defendant's home, and the court's inclusion of this evidence in its instructions to the jury. Defendant argues that testimony concerning beer and wine found at defendant's home was irrelevant to proving the possession of "tax paid whiskey" for the purpose of sale, and that such testimony represented a "fatal variance between pleading and proof." We disagree. Defendant was charged with a violation of G.S. § 18A-7, possession of intoxicating liquor for the purpose of sale. Obviously, defendant's possession of any type of intoxicating liquor, whether beer, wine, or spirituous liquor, would be relevant to a prosecution under this statute. The fact that the State's case for showing a violation of the statute was proving possession of more than four liters of spirituous liquors does not preclude the State from introducing evidence that other, non-spirituous liquors were found in defendant's possession, as such evidence further tends to show that defendant's possession of spirituous liquors was for the purpose of sale. This assignment of error is without merit.

[3] By his seventh and eighth assignments of error, defendant contends the trial judge erred in denying his motions to set aside the verdict. Defendant argues that there is a "fatal variance" between the charge in the citation and the verdict, and that the verdict is "defective as a matter of law." Defendant was charged in a citation with the "possession of tax-paid whiskey for the purpose of sale--G.S. 18A-7--that whiskey being intoxicating liquor." The written verdict submitted to the jury is as follows:

We the jury by unanimous verdict find the defendant
Hugh Warner Harrell

Guilty _____

Not Guilty _____

This 18th day of February, 1980.

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s/ _____
Jury Foreman

The jury placed a check mark in the blank beside "Guilty" and the foreman signed the form. When the verdict was accepted by the court, the following occurred:

THE COURT: Ladies and gentlemen of the jury, by unanimous verdict you find the defendant, Hugh Warner Harrell, guilty of the offense of possession of intoxicating liquor for the purpose of sale. This is your verdict and so say you all?

Defendant argues that since the jury found defendant guilty of "possession of intoxicating liquor for the purpose of sale," it is at fatal variance with the citation which charged defendant with "possession of tax-paid whiskey for the purpose of sale." Obviously, the jury found defendant guilty as charged, as the reference to "tax-paid whiskey" in the citation is merely surplusage. Defendant also argues that the verdict is defective as a matter of law because it did not specify whether defendant was guilty of possession of whiskey for the purpose of sale, or of spirituous liquor for the purpose of sale. As pointed out above, we think the verdict is clear and finds the defendant guilty as charged, and the verdict conforms to the charge in the citation. These assignments of error have no merit.

[4] Finally, defendant's sixth assignment of error relates to the court's instructions to the jury. Where error is assigned to the giving or omission of instructions to the jury in a criminal action, the record on appeal shall contain a transcript of the entire charge given. Rule 9(b)(3)(vi), N. C. Rules of Appellate Procedure. A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it. *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971). In the present case, the entire charge to the jury is not set out in the record, since only those portions of the instructions pertinent to the exceptions raised have been made part of the record. We will therefore not consider any alleged error in the instructions, and this assignment of error is without merit.

We hold that defendant had a fair trial free from prejudicial error.

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No error.

Judges CLARK and WHICHARD concur.

STANLEY G. STEVENS, JR., BY AND THROUGH HIS GUARDIAN AD LITEM, MARY ANN KINARD v. KENNETH L. JOHNSON, EXECUTOR OF THE ESTATE OF STANLEY G. STEVENS, SR.

No. 8010SC573

(Filed 3 February 1981)

Attorneys at Law § 3.1— extent of attorney's authority to bind client

In matters of substance not involving procedure where no action has been commenced by the filing of a complaint, the client's substantive rights, unless expressly waived, are protected so that an attorney must secure express authority from the client before taking action which would affect the client's substantive rights; therefore, in an action to enforce an oral contract for child support which had been negotiated by the attorneys for the mother and father, the trial court properly granted judgment n.o.v. for the executor of the estate of the father, since no civil action for child support was ever commenced; there was no evidence that the father gave his attorney express authority to bind him to additional terms proposed by the mother's attorney; the father's attorney testified that he discussed the additional terms with the father, and the father did not accept them; and the father never gave any authority for settlement beyond that contained in the original letter from his attorney to the mother's attorney.

Judge WELLS concurs in the result.

APPEAL by plaintiff from *Hobgood (Hamilton H.)*, Judge. Judgment entered 21 November 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 8 January 1981.

This is an action to enforce an oral contract for child support. Mary Ann Kinard married Stanley G. Stevens, Sr., on 4 April 1964. Eight months later, Stanley G. Stevens, Jr., was born. Mary Ann and Stanley G. Stevens, Sr., were divorced absolutely on 17 August 1967.

Stevens, Sr., did not provide any support for his son during the first eight years of the boy's life. Kinard alleges, however, that after that time an oral agreement for the support of the boy was reached with Stevens, Sr., through negotiations between their respective attorneys. The purported agreement was never signed, but Stevens, Sr., did subsequently pay Kinard the sum of \$150.00 per month

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and maintained a hospital insurance policy on the child until his death.

Kinard contends the defendant agreed to provide such support until the child reached the age of 18 years and, in addition, agreed to purchase a life insurance policy in the sum of \$10,000 with Stanley, Jr., as beneficiary. Plaintiff further alleges that she spoke to her husband twice about the life insurance policy and he assured her that everything was taken care of. Defendant's executor refused, however, to make support payments after the death of Stanley Stevens, Sr., and no life insurance policy with Stanley Stevens, Jr., as beneficiary was found after Stevens, Sr.'s death.

The jury verdict established that Stevens, Sr., agreed to take out the life insurance policy but did not agree to make support payments beyond death. The court granted defendant's motion for judgment n.o.v. Plaintiff appealed.

Thompson & McAllaster, by Sharon A. Thompson, for plaintiff appellant.

Everett, Creech, Hancock & Herzig, by William A. Creech, for defendant appellee.

HILL, Judge.

In order to determine whether the trial court erred in granting the defendant's motion for judgment notwithstanding the verdict, we must determine the authority of an attorney at law to bind his client.

The record in this case reveals that Kinard swore out a warrant against her former husband seeking support for the child born of the marriage. Stevens, Sr., obtained the services of an attorney, Mr. Edward Hollowell, and on 24 October 1973, Hollowell wrote a letter to Kinard's attorney, Ms. Deborah Greenblatt (nee Mailman), stating that he had reviewed with Mr. Stevens his obligation to support his son and that Stevens was prepared to make the following agreement:

- (1) Mr. Stevens will pay the sum of \$150.00 per month support for said son.
- (2) Mr. Stevens would pay Ms. Mailman's fee in a reasonable amount.

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- (3) Mr. Stevens would claim his son for income tax purposes.
- (4) An orderly visitation schedule will be worked out.
- (5) The nonsupport charges will be dismissed and this letter will serve as a memorandum of understanding and agreement.

Ms. Mailman testified that after receiving the letter she telephoned Mr. Hollowell and advised him that Kinard wanted three additional provisions added to those submitted: (1) life insurance in the sum of \$10,000 with their son as beneficiary; (2) medical insurance for the boy; and (3) an escalator clause on the monthly support provision. Ms. Mailman further testified that Mr. Hollowell told her the life insurance and medical insurance were not any problem; that he did not have to consult with his client about them; and that he (Hollowell) would agree to them as obligations of the defendant.

Mr. Hollowell testified that he received a copy of the three additional proposals prepared by Ms. Mailman on 27 December 1973. Mr. Hollowell stated that he discussed the additional proposals with Stevens, Sr., but that Stevens did not accept them. Hollowell testified that he then advised his client to abide by the terms of his October 1973 letter; that to the best of his knowledge Stevens did so; and that Stevens, Sr., never agreed to anything other than what was outlined in the letter of 24 October 1973.

No separation agreement was ever signed. Stevens did, however, pay \$150.00 support money monthly and acquired a medical insurance policy for his son. The criminal warrant sworn out before the attorneys' negotiations was dropped.

Appellant Kinard contends there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent. *Bank v. Penland*, 206 N.C. 323, 173 S.E. 345 (1934); *Alexander v. Board of Education*, 6 N.C. App. 92, 169 S.E.2d 549 (1969). Appellant argues that this presumption arises not only in regard to the technical or procedural aspects of a case but extends as well to the area of the client's substantive rights. *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E.2d 315, *disc. review allowed* 300 N.C. 196 (1980).

We note, however, that the cases cited by appellant deal with

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actions taken by attorneys after complaint has been filed. For example, in *Greenhill, supra*, plaintiff's attorney filed a notice of voluntary dismissal pursuant to Rule 41(a) after plaintiff had previously taken a dismissal pursuant to Rule 41(a)(1) in another, but identical, action. Subsequent to the second notice of dismissal, plaintiff, employing different counsel, filed a motion pursuant to Rules 60(b)(4) and (6) to set aside the second notice of dismissal charging that the attorney had no express or implied authority from plaintiff to file the notice. This Court held that the dismissal affected plaintiff's substantive rights, but that plaintiff had not rebutted the presumption that plaintiff's attorney had the authority to act for his client.

Although the *Greenhill* court held that the presumption of an attorney's authority extends to substantive matters, we note that the dismissal made by the attorney in that case involved the management of the *procedure* of the case—an area in which the attorney is skilled and trained far more so than the client. Hence, the judgment of the attorney in such cases ought to be given more weight.

In the case *sub judice* no civil action for support was ever commenced. See G. S. 1A-1, Rule 3. We hold that in such matters of substance, not involving procedure, where no action has been commenced by the filing of a complaint, that the client's substantive rights—unless waived expressly—must be protected so that an attorney must secure express authority from the client before taking action which would affect the client's substantive rights.

We find no evidence in the record of Stevens having given Hollowell express authority to bind him to the additional terms proposed by Ms. Mailman. In fact, Hollowell testified that he discussed the additional terms with Stevens, and Stevens did not accept them. This testimony is not disputed.

We find that Stevens never gave any authority for settlement beyond that contained in the letter of 24 October 1973. Neither did he ratify the proposed agreement by acquiring medical insurance on the child.

In granting the judgment n.o.v., the trial judge committed

No error.

Judge ARNOLD concurs.

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Judge WELLS concurs in the result.

STATE OF NORTH CAROLINA v. RANDY ANTHONY PERRY

No. 8010SC788

(Filed 3 February 1981)

Criminal Law § 75.13—incriminating statements made to bail bondsman — no necessity for Miranda warnings — voluntariness

When taking a defendant who was a bail jumper into custody, a bail bondsman was not acting as a law officer or as an agent for the State, and the bondsman had no obligation to give defendant the *Miranda* warnings in order to render admissible incriminating statements made by defendant to the bondsman. Furthermore, defendant's incriminating statements to the bondsman were made knowingly and voluntarily where defendant testified that he was threatened with a shotgun and was struck on the head with the shotgun at the time he was taken into custody by the bondsman, the incriminating statements by defendant occurred a substantial time later during a drive to the county of trial and were made in an atmosphere of casual conversation, defendant testified that he had "shot" some drugs but that he was not under the influence of the drugs when he made the statements, and the trial judge made findings and conclusions to the effect that defendant understood all that was taking place prior to his arrest and during the trip back to the county of trial and that the bail bondsman did not use any tactics or pressure to secure a statement from defendant.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 17 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 8 January 1981.

Defendant was convicted of the armed robbery of a Fast Fare store in violation of G. S. 14-87 and sentenced to not less than seven nor more than fifty years' imprisonment. Defendant has appealed, bringing forth four assignments of error. Pertinent facts will be stated in the opinion.

Attorney General Edmisten, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

Donald H. Solomon, for defendant appellant.

HILL, Judge.

The defendant contends that the testimony of C. L. Collins, a bail bondsman, concerning statements made by the defendant should have been suppressed. Defendant argues that his statements

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were made after he was taken into custody by Collins and that *Miranda* warnings were not given. Defendant further argues that because his extrajudicial statements were not made voluntarily and knowingly, but were made during an improper interrogation, they should have been suppressed. We do not agree with defendant's contentions.

On *voir dire*, the trial judge found that, while a warrant had been issued for the defendant in connection with the case *sub judice*, the defendant had not been arrested on the warrant or indicted for the offense. Defendant had in fact fled when an arrest for the offense involved in the case *sub judice* was attempted.

The trial judge further found the defendant failed to appear on a bond which Collins had posted on defendant's behalf in another case. Collins located the defendant in a migrant workers' camp near Benson. With another person, Collins proceeded to the migrant workers' camp and arrested the defendant. Neither Collins nor the other person are law enforcement officers. Both Collins and the other person carried unloaded shotguns, which they intended to use as a bluff, if needed. When the defendant started to run, Collins grappled with the defendant, hitting him on top of the head with the barrel of the shotgun. Collins and his associate then handcuffed the defendant and placed him in Collins' car.

During the early part of the drive back to Wake County, there was little, if any, conversation between the parties. Collins stopped the car for gas and switched the handcuffs on the defendant from the back of his person to the front. Thereafter, in order to stay awake, Collins engaged in "street conversation" with the defendant. During this conversation, Collins posed a general question to the defendant as to why defendant left without paying the premium on the bond. Defendant replied generally, acknowledging the robbery for which he was then on trial. Defendant further replied that he was trying to get the bondsman's money and that he had to leave his daddy's car while fleeing from the police after the robbery.

The trial judge further found that although the defendant had incurred a cut on his head requiring five stitches to close, defendant remembered perfectly what happened during the time of the conversation and was in no way mentally or physically unaware of the circumstances or what he was saying or doing.

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G. S. 85C-7 provides:

For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or by his written authority endorsed on a certified copy of the undertaking, may request any judicial officer to order arrest of the defendant.

We do not interpret the arrest provisions of this statute as creating a law enforcement officer in the person of the bail bondsman. Neither do we conclude that the bondsman's right to request that a judicial officer order the arrest of a defendant creates a "law enforcement officer" in the person of the bail bondsman. The bondsman's right of arrest is simply a codification of the common law rule that has been recognized in North Carolina for many years. *See State v. Lingerfelt*, 109 N.C. 775, 14 S.E. 75 (1891).

When taking a bail jumper into custody, a bail bondsman is not acting as a law enforcement officer or as an agent of the state in any regard. His right of arrest is private in nature, arising out of the bail contract between the principal and his surety. Thus, there was no obligation on the part of the bail bondsman to give *Miranda* warnings.

[I]t is generally accepted that a statement made to a private individual is not inadmissible by virtue of the private individual's failure to warn the accused in terms of the *Miranda* requirements.

In re Simmons, 24 N.C. App. 28, 32, 210 S.E.2d 84 (1974), *citing* McCormick's Handbook on the Law of Evidence, § 162 (2d Ed. 1972).

Defendant further contends that when taken into custody by the bail bondsman, any words or actions on the part of the bail bondsman that were reasonably likely to elicit an incriminating response from the defendant are impermissible and render a confession elicited by those actions inadmissible. *See Rhode Island v. Innis*, ____ U.S. ____, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). *Innis* deals with a defendant *arrested by a police officer*, not with a custodial apprehension by a private citizen.

We are not impressed by defendant's arguments that the defendant's statements were not voluntarily made. Defendant testi-

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fied that at the time of the arrest Collins pointed the shotgun at him and said, "Don't run, Randy." and "Nigger, all that money you made me lose, I ought to kill you." Defendant further testified that he was struck on the head with the shotgun and the gun was later discharged outside the place of arrest. The admissions by the defendant occurred, however, a substantial time later during the drive back to Wake County and were made in an atmosphere of casual conversation. Defendant testified at the *voir dire* that he had "shot" some drugs, but further testified that he was not under the influence of the drugs when he made the admissions.

The trial judge made findings of fact and conclusions of law to the effect that the defendant understood all that was taking place prior to his arrest and during the trip in the car back to Wake County. The judge found that the bail bondsman did not use any tactics or pressure to secure a statement from the defendant. The record corroborates the findings of fact by the judge, and we are bound thereby. *See State v. Johnson*, 272 N.C. 239, 158 S.E.2d 95 (1967).

Defendant raises two further questions. One deals with photographic identification of the defendant; the other with the introduction of certain evidence. The questions raised are not novel and have no merit. Furthermore, the introduction of such evidence would be harmless in the light of the total evidence offered against the defendant.

In defendant's trial we find

No error.

Judges ARNOLD and WELLS concur.

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STATE OF NORTH CAROLINA v. CLAUDE VANCE COOLEY, DEFENDANT-
OBLIGOR, AND MRS. META YOUNG, SURETY-OBLIGOR

No. 8010SC856

(Filed 3 February 1981)

Arrest and Bail §§ 9.2, 11.3— post conviction appearance bond — requirement that defendant report to county probation office — order of forfeiture of bond

The trial court had authority under G.S. 15A-536(d) to require defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the Wake County Probation Office and to order that defendant report to the Probation Office by noon each Monday, and the trial court was authorized by G.S. 15A-544(c) to enter a judgment of forfeiture of the bond upon determining that defendant failed to comply with the condition requiring him to report to the Probation Office and that defendant had failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault.

APPEAL by Defendant-Obligor and Surety-Obligor from *Preston, Judge*. Judgment entered 9 May 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 16 January 1981.

Defendant-Obligor, Claude Vance Cooley, was convicted in Wake County Superior Court on 14 June 1979 of various controlled substance and conspiracy offenses. He received active sentences and was committed to the North Carolina Department of Correction for safekeeping pending appeal. On 3 August 1979, pursuant to Defendant-Obligor's request, the trial court ordered Defendant-Obligor released upon the posting of a secured appearance bond in the sum of \$50,000.00 and upon compliance with certain special conditions. On 7 August 1979 the Surety-Obligor posted the requisite bond. Contemporaneously therewith Defendant-Obligor accepted and acknowledged receipt of a copy of the release order, and he was released.

One of the special conditions of the order for bond and release was as follows:

That the Defendant [Obligor] be placed in the custody of the Wake County Probation Office to report in person on each Monday to Ms. Anne Porter, or her designee, such report to be made no later than 12:00 noon on each Monday.

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On 1 October 1979 Defendant-Obligor was scheduled to appear in Wake County Superior Court for trial on charges unrelated to the charges here. 1 October 1979 was a Monday on which Defendant-Obligor was, pursuant to the provision quoted above, required to report to the Wake County Probation Office by noon. Defendant-Obligor failed to report; and as a consequence Judge John C. Martin on 1 October 1979 entered an order terminating his post-conviction release, revoking his post-conviction bond and ordering forfeiture of the bond.

On 9 May 1980 Judge Edwin S. Preston heard evidence and arguments of counsel for Defendant-Obligor, Defendant-Surety, and the Wake County School Board, and entered judgment against the defendants, jointly and severally, in the sum of \$50,000.00 upon the post-conviction appearance bond. From this judgment, defendants appeal.

Attorney General Edmisten, by Associate Attorney Richard H. Carlton, for the State.

Ransdell, Ransdell and Cline, by William G. Ransdell, Jr. and James E. Cline, for Defendant-Obligor and Surety-Obligor, appellants.

WHICHARD, Judge.

Defendants contend that the bond in question was given to secure Defendant-Obligor's appearance in the trial court following decision by this Court on his appeal in these cases; that on 1 October 1979, when Defendant-Obligor failed to report to the Wake County Probation Office as ordered, this Court had not rendered a decision on said appeal; and that the order of forfeiture and the subsequent judgment thereon were improper and without legal authorization. We find statutory authorization for the trial court's entries, and we thus reject defendants' contentions.

G.S. 15A-536, in pertinent part, provides:

(a) A defendant whose guilt has been established in the superior court and is either awaiting sentence *or has filed an appeal* from the judgment entered may be ordered released *upon conditions* in accordance with the provisions of this Article.

(b) If release is ordered, the judge must impose the

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conditions set out in G.S. 15A-534(a) [one of which is the execution of an appearance bond secured, *inter alia*, by at least one solvent surety] which will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community. If no single condition gives the assurance, the judge may impose the *condition in G.S. 15A-534(a)(3)* [which authorizes placing a defendant in the custody of a designated person or organization agreeing to supervise him] *in addition to any other condition* and may also, or in lieu of the condition in G.S. 15A-534(a)(3), place restrictions on the travel, associations, conduct, or place of abode of the defendant.

G.S. 15A-536(a) and (b) (1978) (emphasis supplied). The requirement of an appearance bond is one of the conditions for release authorized by G.S. 15A-534(a); thus, the trial court had authority under G.S. 15A-536(b) to mandate the bond at issue here. The placement of a defendant in the custody of a designated “person or organization agreeing to supervise him” is “the condition in G.S. 15A-534(a)(3)”; thus, the trial court had further authority under G.S. 15A-536(b) to consign Defendant-Obligor to the custody of the Wake County Probation Office. The order that Defendant-Obligor report to the Probation Office by noon each Monday was material to that agency’s capacity “to supervise him”; thus, the trial court had still further authority under G.S. 15A-536(b) to impose this requirement in furtherance of that statute’s broad purpose to “assure the presence of the defendant when required and provide adequate protection to persons and the community.”

G.S. 15A-544(b), in pertinent part, provides:

If the principal *does not comply with the conditions* of the bail bond, the court having jurisdiction must *enter an order declaring the bail to be forfeited.*

G.S. 15A-544(b) (1978) (emphasis supplied). When Defendant-Obligor failed to comply with the condition requiring him to report to the Probation Office, G.S. 15A-544(b) authorized the trial court to enter the order of forfeiture.

G.S. 15A-544(c), in pertinent part, provides:

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If the principal does not appear . . . and satisfy the court that his appearance on the date set was impossible or that his failure to appear was without his fault, the court must enter judgment for the State against the principal and his sureties for the amount of the bail and the costs of the proceedings.

G.S. 15A-544(c) (1978). While the judgment contains no finding of fact that the principal (Defendant-Obligor) failed to satisfy the court that his appearance in compliance with the condition was impossible or that his failure to appear was without his fault, the record establishes that the court heard evidence and arguments of counsel before entering judgment. It is evident, therefore, that the court proceeded appropriately and made the requisite pre-judgment determination that the evidence and arguments presented failed to satisfy it that Defendant-Obligor's failure to appear in compliance with the condition was due to impossibility or without fault on his part. When we construe the provision of G.S. 15A-544(c) set forth above in accord with what we believe to be the purpose of the post-conviction release statutes "taken as a whole," *State v. Partlow*, 91 N.C. 550, 552 (1884), we hold that the trial court was authorized to enter the judgment of forfeiture upon such determination.

The judgment is therefore

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROBERT ENOCH WITHERS

No. 8017SC701

(Filed 3 February 1981)

Assault and Battery § 13; Criminal Law § 34.7—defendant's conviction of prior offense — admissibility of evidence

In a prosecution of defendant for carrying a concealed weapon, trespass, and assaulting law enforcement officers with a firearm while in the performance of their duties, trial court did not err in admitting evidence concerning defendant's prior criminal record, since evidence of the prior conviction of defendant for a crime of violence was clearly relevant to the issue of guilt, and all the evidence

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relating to the other crime was based on the admission of such crime by defendant made immediately before or during the commission of the crimes charged and tended to show some reason for his threats and assaults on the law officers.

APPEAL by defendant from *Walker (Hal Hammer)*, Judge. Judgments entered 28 February 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 4 December 1980.

Defendant was convicted of three misdemeanor charges -- carrying a concealed weapon, possession of marijuana, and trespass, and five felony charges of assaulting law enforcement officers with a firearm while in the performance of their duty. Defendant appeals from judgments imposing five consecutive five-year prison sentences, and from two concurrent six-month sentences on the concealed weapon and trespass charges. Judgment was arrested on the possession of marijuana charge.

The evidence for the State in summary tended to show the following:

On 2 December 1979 about 7:00 p.m., defendant entered the communications room of the Surry County Sheriff's Department where Officer D. R. McKinney was on duty as dispatcher. Defendant requested a record check on his criminal record. McKinney attempted to get the record but was unable to do so. Defendant made several telephone calls, one to a lawyer who had represented him on an assault charge in Greensboro, and he threatened the lawyer's life. Defendant then called the Guilford County Sheriff's Department, threatened an officer on duty, told him he had a .357 magnum and was coming down that night.

Defendant then pulled a pistol from his belt and asked McKinney to check and see if the pistol was wanted. McKinney found no information on the weapon. With gun in hand defendant backed to a corner and made another telephone call. McKinney, by radio, called for assistance.

Deputy Sheriff Belton entered the room. Defendant pointed the gun at Belton and said no one was taking the weapon from him. Sheriff Hall then entered the room and asked defendant to get out of the communications room. Defendant went out to the lobby with Officers Hall and Belton. Several other deputies arrived, and defendant held them at gunpoint for about forty-five minutes, made threats, and bragged about a shoot-out with Greensboro police.

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Finally, Sheriff Hall talked defendant into leaving, the pistol still in his hand.

Shortly thereafter the Sheriff was informed that defendant was in The Pantry and refused to leave as requested by the management. Two officers entered The Pantry with guns drawn. As they approached, defendant reached for his gun but did not pull it from his belt. He was arrested.

The telephone calls made by defendant in the communications room were tape recorded. They were admitted in evidence.

Defendant offered no evidence.

Attorney General Edmisten by Special Deputy Attorney General Isaac T. Avery, III for the State.

Royster and Royster by Michael F. Royster for defendant appellant.

CLARK, Judge

The defendant makes numerous assignments of error which are grouped into several arguments relating to the admission in evidence of his prior criminal record. The record on appeal reveals that Officer McKinney and other officers testified that defendant stated to them he was a convicted felon, and that he had a shoot-out with a bunch of cops in Greensboro. Attorney L. G. Gordon, Jr., testified that on the night in question he received a telephone call from the defendant, who said he was in a sheriff's office, asked why there was no record of his conviction in a Greensboro court, said that he had a .357 magnum and was going to kill him (Gordon), and that he wanted to find Judge Kivett. Gordon also testified that he represented defendant when he was tried and convicted in Greensboro on the charge of assault on a police officer by pointing a gun.

Defendant makes the argument that this evidence of prior conviction was inadmissible under the general rule that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. Defendant relies on *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), for the general rule and the eight listed *exceptions* to the general rule, and contends that the evidence of his prior conviction was erroneously admitted because the evidence of the other crime does not fall within any of the eight

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exceptions. We do not accept defendant's restrictive interpretation of the *McClain* decision. In the recent decision, *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128, 144 (filed 2 December 1980) Justice Exum cited *McClain* to support the following rule of law: "It is, of course, error for the state 'in a prosecution for a particular crime [to] offer evidence tending to show that the accused has committed another distinct, independent, or separate offense' when *the sole purpose* of the evidence is, generally, to show that the defendant is a bad person and, therefore, predisposed to commit criminal acts generally." (Emphasis added.)

We consider the eight listed exceptions to the general rule in *McClain* to be illustrative of circumstances wherein evidence of a separate crime is relevant on the issue of guilt and not limited to the purpose of showing a predisposition to commit the crime charged. Simply stated, the rule is that evidence of the commission of another offense is admissible to prove some other fact logically relevant to the issue of guilt. See 1 Stansbury's N.C. Evidence §91 (Brandis rev. 1973); Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 Wake Forest L. Rev. 17, 31 (1970).

In the case before us evidence of the prior conviction of the defendant for a crime of violence in Greensboro was clearly relevant to the issue of guilt. All the evidence relating to the other crime was based on the admission of such crime by defendant made immediately before or during the commission of the crimes and tended to show some reason for his threats and assaults. The elimination of this evidence would have left the jury without any explanation of or reason for the defendant's bizarre criminal conduct. We find no merit in defendant's argument.

We would rate the State's evidence, which included numerous eyewitnesses and tape recordings of defendant's admission, as overwhelming. Under the circumstances the defendant had a difficult burden in showing prejudicial error. It is not reasonably possible that a different result would have been reached at trial if the assigned errors had not been committed. See G.S. 15A-1443. We find that defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and WHICHARD concur.

State v. Molko

STATE OF NORTH CAROLINA v. ROBERT MOLKO

No. 8017SC664

(Filed 3 February 1981)

Assault and Battery § 15.5— defense of self — instruction required

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where defendant contended that the victim grabbed defendant by the hair and t-shirt to drag him into a cell for the purpose of a homosexual act and that defendant then swung at the victim with a razor to get the victim to remove his hands, a jury question was raised as to whether defendant reasonably felt he was in imminent danger of a homosexual assault and whether he used more force than was reasonably necessary to repel the assault.

APPEAL by defendant from *Walker (Hal Hammer), Judge*. Judgment entered 20 February 1980 in Superior Court, CASWELL County. Heard in the Court of Appeals 12 November 1980.

Defendant was tried for assault with a deadly weapon with intent to kill inflicting serious injury upon Allen Hall. On 2 November 1979, Hall and the defendant were inmates at Blanch Institution, Ivy Bluff Prison, Caswell County. Curtis Jefferies and David McGee, who were guards at the Blanch Institution on that date, testified that they saw the defendant approach Allen Hall from Allen Hall's back and cut Hall's neck with a two-inch razor blade that had been melted into a ball-point pen. They searched Allen Hall immediately after the incident and did not find a weapon on him. Allen Hall received a cut near his jugular vein which required eight stitches to close.

The defendant offered evidence to the effect that Allen Hall was trying to get him to come to Hall's cell for the purpose of performing a homosexual act. Defendant testified:

"Allen Hall called me back up there so I walked up to the cell and Hall said, 'Look, I told you to go to the cell', and I said, 'I ain't going in, I don't want any trouble with you' and he grabbed me by the side of the head by my hair and t-shirt and I pushed back and I tried to knock his hand away and he had hold here, then I don't know if he still had hold but I pushed back and pulled the razor blade from my pocket and I swung at him and I was scared and if I cut him I don't know but I was not trying to kill the man or nothing like that, I was trying to get the man off,

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that is all.”

Several inmates testified for the defendant that Hall was bothering the defendant by trying to get him to come to his cell; that defendant told Hall not to bother him; that Hall grabbed the defendant; that they saw someone other than the defendant cut Hall; but that they did not know the identity of that person.

The jury found the defendant guilty of assault with a deadly weapon inflicting serious injury. He appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Everett Noland and Associate Attorney Steve F. Bryant, for the State.

Lloyd M. Gentry and Ronald M. Price for defendant appellant.

WEBB, Judge.

The defendant assigns as error the failure of the court to charge on self-defense. When supported by competent evidence the court is required to charge on self-defense. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). A person may use such force to repel an attack as reasonably appears necessary to him. The jury must determine the reasonableness of the defendant's belief. A person may not use deadly force to repel an attack when it does not reasonably appear that he must do so in order to protect himself from death or great bodily harm. *See State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979). In the light most favorable to the defendant, the evidence showed that Allen Hall grabbed the defendant's hair and t-shirt to drag him into a cell for the purpose of a homosexual assault. When the defendant was unable to remove Hall's hands from his body, he swung at Hall with a razor to get Hall to remove his hands. We believe that a person who is put in fear of a homosexual assault is put in fear of great bodily harm. We hold it was a jury question in the case sub judice as to whether the defendant reasonably felt he was in imminent danger of a homosexual assault and whether he used more force than was reasonably necessary to repel the assault. Since the court did not charge the jury on self-defense, we hold there must be a new trial.

The questions raised by the defendant's other assignments of error may not recur at a new trial, and we do not discuss them.

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New trial.

Chief Judge MORRIS and Judge MARTIN (Harry C.) concur.

MASLIN H. RUSS v. ZACK RUSS, JR.

No. 8027SC608

(Filed 3 February 1981)

Constitutional Law § 26.6— foreign judgment for alimony — absence of proper service of process — no full faith and credit

A Florida court had no *in personam* jurisdiction over defendant in an action to recover alimony due plaintiff, and a default judgment for alimony entered by the Florida court was not entitled to full faith and credit, since Florida law required that out-of-state defendants be served by officers rather than postal officials, and defendant was served in N. C. by certified mail, return receipt requested.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 19 February 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 13 January 1981.

Action was brought in the trial court to enforce a default judgment for alimony due plaintiff, said judgment having been entered by a circuit court of the State of Florida. A certified copy of the judgment was attached to plaintiff's complaint. An affidavit signed by plaintiff's Florida attorney and a copy of a return receipt requested form, which had been signed at defendant's address by defendant's stepdaughter, were also attached to the complaint and tended to show that defendant had been properly served. Evidence at trial showed that the stepdaughter is an adult and under no disability.

The trial court adjudged that defendant had been properly served in North Carolina and that the Florida judgment holding defendant responsible for \$15,386.48 in alimony and child support must be given full faith and credit. Defendant appealed.

Guller & Bridges, by Jeffrey M. Guller and Doris Shaw Bridges, for plaintiff appellee.

Garland & Alala, by Richard L. Voorhees and M. Brooke Lamson, for defendant appellant.

Russ v. Russ

HILL, Judge.

Article IV, Section 1 of the U. S. Constitution, provides that "Full Faith and Credit shall be given in each State to the . . . Judicial Proceedings of every other State." However, the courts of this State are bound by the Florida judgment in the case *sub judice* only if the Florida court had jurisdiction over defendant. We agree with defendant's contention in his first assignment of error that the Florida court did not have *in personam* jurisdiction over him.

An examination of Florida law reveals that Fla. Stat. § 48.193, that state's long-arm statute, gives Florida jurisdiction, with respect to proceedings for alimony or child support, over any person who resided in the state before or at the time of the commencement of the action. Fla. Stat. § 48.194 governs service of process upon out-of-state defendants in cases such as the one *sub judice*. The statute allows service of process by "any officer authorized to serve process in the state where the person is served" in the same manner as service within Florida could be accomplished.

Service within Florida is governed, for our purposes, by two statutes. Fla. Stat. § 48.021(1) provides, in pertinent part, that "[a]ll process shall be served by the sheriff of the county where the person to be served is found . . ." § 48.031 goes on from there; and in 1977, when service was made, provided that service could be completed by "delivering a copy of it to the person to be served . . . or by leaving the copies at his usual place of abode with some person of the family who is 15 years of age or older and informing the person of their contents."

Upon examination of the statutes cited above, it appears to this Court that Florida requires service of process within the state to be by the county sheriff or special process server appointed by the county sheriff. Florida carries this requirement over to service of process outside the state, except in certain enumerated situations, by requiring that out-of-state defendants be served by officers rather than postal officials.

We conclude that defendant was not properly served under the applicable Florida statutes and Florida's courts never obtained *in personam* jurisdiction in the case. Consequently, the Florida judgment is void and will be treated as a nullity. See *Casey v. Barker*, 219 N.C. 465, 467, 14 S.E.2d 429 (1941).

Weidle v. Cloverdale Ford

The judgment of our State's trial court must be reversed. Our action renders pointless a discussion of defendant's remaining assignment of error which we find to be frivolous and without merit.

Reversed.

Judges ARNOLD and WELLS concur.

ERWIN WEIDLE PLAINTIFF-EMPLOYEE v. CLOVERDALE FORD, DEFENDANT-EMPLOYER, AND INTERNATIONAL INSURANCE COMPANY, DEFENDANT-CARRIER

No. 8010IC581

(Filed 3 February 1981)

Master and Servant § 74—workers' compensation — serious bodily disfigurement — insufficient evidence

There was no evidence in the record to support a finding by the Industrial Commission that an injury to plaintiff's finger resulted in "serious bodily disfigurement."

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission, by Commissioner Coy M. Vance, filed 11 April 1980. Heard in the Court of Appeals 9 January 1981.

Defendant-employer and defendant-carrier appeal from an award to plaintiff for "serious bodily disfigurement" resulting from a cut finger sustained by accident arising out of and in the course of plaintiff's employment with the defendant-employer.

The record contains an Opinion and Award by Deputy Commissioner W. C. Delbridge in which the Commissioner made the following Finding of Fact:

As a result of the injury in question, plaintiff has disfigurement which was viewed by the undersigned and is described as follows:

"Let the record show that the undersigned observed the right middle finger of the plaintiff on the right hand and noted that the nail and just beneath the nail there is evidence of a scar apparently where it was injured and that the fingernail itself is disfig-

Weidle v. Cloverdale Ford

ured in that it is marked to the extent that it has a roughish appearance and then there is deformity of the nail."

The Commissioner further found that as a result of the injury plaintiff "has suffered bodily disfigurement . . . which is permanent and serious and is such as would tend to hamper plaintiff in his earnings in seeking employment" and "that proper and equitable compensation for said disfigurement is \$100.00." He thereupon awarded plaintiff the sum of \$100.00. The Full Commission changed the amount of the Award from \$100.00 to \$200.00 and otherwise adopted and affirmed the Opinion and Award of the Commissioner.

The only evidence contained in the record on appeal is the following summary of testimony of the plaintiff:

My [name] is Erwin Weidl (sic); I am 42 years old and a body repairman for Cloverdale Ford. On August 12, 1978 I was cutting out on a car, slipped on some metal and sliced open my right middle finger behind my fingernail. Since I returned to work in September 1978 I have continued to work in the same position with Cloverdale Ford. The injury causes me no discomfort. I have the same duties that I had before the accident, perform the same tasks and do nothing different in my work than I did before. I do not suffer any embarrassment on the job as a result of my finger.

No brief filed for plaintiff-appellee.

Hudson, Petree, Stockton, Stockton and Robinson, by Grover G. Wilson, for defendant-employer and defendant-carrier, appellants.

WHICHARD, Judge.

In *Lawrence v. Mill*, 265 N.C. 329, 330-331, 144 S.E.2d 3, 4 (1965), the North Carolina Supreme Court, per Justice Higgins, stated:

In compensation cases the Commission finds the facts. If the findings have evidentiary support in the record, they are conclusive. However, the question whether the evidence is sufficient to support the findings is one of law to be determined by the courts.

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We thus review the evidence here solely to determine its sufficiency to support the findings on which plaintiff's award is based.

The totality of the evidence in this record is the testimony of plaintiff quoted in full above. That testimony, and thus the record in its entirety, is devoid of evidence to support the findings of the Commissioner which were adopted by the Full Commission. The finding based on the Commissioner's personal observation, standing alone, is inadequate; for it affords the appellate court no basis for review.

"The Legislature has provided that the [Workers'] Compensation act shall be liberally construed but it does not permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates." *Lawrence*, 265 N.C. at 331, 144 S.E.2d at 4-5. There being no evidence in the record to support the finding that the injury to plaintiff's finger resulted in "serious bodily disfigurement" within the meaning of G.S. 97-31(22), the decision of the North Carolina Industrial Commission is

Reversed.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. BONNIE CUTSHALL ROBERTS

No. 8028SC704

(Filed 3 February 1981)

Constitutional Law § 35— waiver of constitutional rights — conclusiveness of trial court's findings

There was no merit to defendant's contention that the trial court improperly concluded that defendant knowingly, intelligently, freely and voluntarily waived each of her constitutional rights, since there was competent evidence to support the trial judge's findings that defendant had been advised of her constitutional rights, that she understood those rights, and that she executed a written waiver of those rights.

APPEAL by defendant from *Allen*, *Judge*. Judgment entered 22 February 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals on 4 December 1980.

Defendant was charged in a proper bill of indictment with the

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first degree murder of her husband, Willis Albert Roberts, on 24 October 1979. Defendant pleaded not guilty, and the jury found defendant guilty of second degree murder. From a judgment imposing a prison sentence of "not less than ten (10) years nor more than twenty-five (25) years," defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Riddle, Shackelford, and Hyler, by George B. Hyler, Jr. and Robert W. Clark, for the defendant appellant.

HEDRICK, Judge.

Defendant's first assignment of error is set out in the record as follows:

That the Court improperly concluded as a matter of law that the constitutional waivers executed by the Defendant were made freely, voluntarily, understandingly and that the Defendant knowingly, intelligently, freely and voluntarily waived each of her constitutional rights.

The record before us indicates that when the State offered into evidence certain statements made by defendant to various law enforcement officials, defendant objected, and the court conducted a *voir dire* to determine the admissibility of such statements. The *voir dire* proceeding, including the testimony, covers sixty-four pages in this record. At the conclusion of the *voir dire*, the trial judge made detailed and extensive findings of fact with respect to each statement, and concluded that such statements were "made freely, voluntarily and understandingly;" that defendant had "full understanding of her Constitutional right to remain silent, right to counsel, and all other rights"; and that defendant "knowingly, freely and intelligently and voluntarily waived each of these rights and thereupon made the statement[s] . . ." Where the court finds that the defendant made the statement understandingly and voluntarily after he had been fully advised of his constitutional rights and had freely, knowingly, and voluntarily waived those rights, and such a finding is supported by competent evidence, the finding is conclusive and will not be disturbed on appeal. *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978); *State v. Hoskins*, 42 N.C. App. 108, 256 S.E.2d 290, *disc. rev. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979); *State v. McNeill*, 33 N.C. App. 317, 235 S.E.2d 274 (1977). In

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the present case, the trial judge found as a fact that defendant had been advised of her constitutional rights, that she understood those rights, and that she executed a written waiver of those rights. All the critical findings made by the trial judge are amply supported by competent evidence in the record, and the findings in turn support the order permitting the admission of the statements into evidence.

We point out that none of the evidence adduced at the trial before the jury is set out in the record. The statements challenged by this assignment of error are not reproduced anywhere in the record. Indeed, the record contains none of the evidence that was submitted to the jury. Assuming *arguendo* that the trial judge erred in admitting certain statements made by defendant to law enforcement officials, defendant, by her failure to set out the evidence adduced at trial in the record, has made it impossible for us to find that such error was prejudicial. This assignment of error has no merit.

By her third assignment of error, defendant contends that the court erred in failing to declare and explain the law arising on the evidence. More specifically, defendant argues that "the court failed to properly apply the law to the various factual situations presented by the conflicting evidence." Since, as pointed out above, the evidence is not reproduced in the record, we are unable to evaluate this assignment of error. *See also State v. Allen*, 283 N.C. 354, 196 S.E.2d 256 (1973). Defendant has failed to show any prejudicial error.

We have examined defendant's remaining assignment of error relating to the exclusion of evidence on *voir dire* and find it to be without merit.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and WHICHARD concur.

State v. Jones and State v. Everett

STATE OF NORTH CAROLINA v. EDDIE LEE JONES AND STATE OF
NORTH CAROLINA v. JERRY DONALD EVERETT

No. 804SC748

(Filed 3 February 1981)

**Criminal Law § § 112.3, 119— question by jury — what evidence could be
considered — oral request for special instruction**

In this prosecution of defendants for two armed robberies wherein one of the victims was unavailable to testify at the trial and the jury, after deliberating for some time, asked the court whether “we have to base the verdict on strictly the evidence we have heard due to the fact that one of the State’s witnesses is not here,” the trial court did not err in instructing the jury that it could consider only the evidence it heard from the witness stand and the exhibits. Furthermore, the trial court did not abuse its discretion in failing to give an instruction orally requested by defense counsel that the jury could consider not only the evidence they heard from the witness stand “but also the lack of evidence,” since the circumstances arising from the jury’s question did not excuse defendants from the requirement of G.S. 1-181 that a request for special instructions be submitted in writing prior to the charge, and the court had previously instructed the jury that a reasonable doubt could arise out of some or all of the evidence or from the lack or insufficiency of the evidence.

APPEAL by defendants from *Barefoot, Judge*. Judgments entered 18 March 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 6 January 1981.

Defendants were each indicted on two counts of armed robbery. They were each convicted of common law robberies and received consecutive sentences. Both defendants have appealed from the judgments entered.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Ellis, Hooper, Warlick, Waters & Morgan, by Charles H. Henry, Jr., for defendant Jones.

Hamilton & Sandlin, by Billy G. Sandlin, for defendant Everett.

WELLS, Judge.

One of the witnesses for the State, Kenneth L. Emmons, testified that he and a friend, Jeffrey Wojciechawski, were assaulted and robbed by defendants in the early morning hours of 1 December 1979. This testimony was corroborated in part by another witness for the State, James McClinton. Jeffrey Wojcie-

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chawski did not testify at the trial. Emmons testified on direct examination that Wojciechawski was at the time of the trial on "a Mediterranean Cruise out in Spain."

After the jury had deliberated for a period of time they returned to the courtroom and requested of the court: "The question is do we have to base the verdict on strictly the evidence we have heard due to the fact that one of the State's witnesses is not here?" In response to the jury's question the court stated:

Members of the jury, the only evidence that you can consider is what you heard come from the stand and any other evidence that was introduced by the State, which would be six exhibits or seven exhibits, I believe. That is the only thing you can base your decision on is what you heard come from this witness stand or either the exhibits.

One of the defense attorneys "asked the court to instruct the jury that they may consider not only the evidence they heard from the witness stand, but also the lack of evidence." The court denied this request and further instructed the jury as follows:

Members of the jury, consider all of the evidence that comes from that stand. That is the only evidence whether it is for the State or the two defendants. That is the only evidence you are to consider. I will let you go back and deliberate unless you have another question.

The defendants' first assignment of error is based on their exceptions to the court's response to the jury's question and to the reiteration of that response. The second assignment of error is based on defendants' exception to the court's denial of their request for instructions.

We note that defendants, in their brief, have failed to refer to the assignments of error and exceptions upon which these assignments of error are based, in violation of Rule 28(b)(3), Rules of Appellate Procedure. Nevertheless we shall discuss the questions raised by defendants.

We first find no error in the alleged instruction given by the trial judge in response to the jury question. In *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977), an exception to similar instructions was found to have no merit. The Court stated that "[t]he trial

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judge was simply telling the jury what to consider as evidence in arriving at its verdict.” *Id.*, at 472, 238 S.E. 2d at 472.

Defendants’ second assignment of error concerns the failure of the trial judge to give the requested instruction. G.S. 1-181¹ sets forth the requirements for a request for special instructions to the jury. Although another victim present at the time the robbery was committed was not in court at the trial of the case, defendants failed to make a request in writing prior to the charge of the court with respect to the absence or failure to give testimony of this person. We do not believe that the circumstances arising from the jury’s question excuse defendants from the requirement of G.S. 1-181, and it was entirely within the discretion of the trial judge as to whether defendants’ oral request should be granted. Additionally, we note that the trial judge had earlier instructed the jury that the State must prove to them that each defendant was guilty beyond a reasonable doubt. He defined reasonable doubt as “ a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be.” We find no prejudicial error in the failure of the trial judge to give the requested instruction.

No error.

Judges ARNOLD and HILL concur.

¹ § 1-181. Requests for special instructions. -- (a) Requests for special instructions to the jury must be --

- (1) In writing,
- (2) Entitled in the cause, and
- (3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge’s charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same.

State v. Quinerly

STATE OF NORTH CAROLINA v. JAY MELVIN QUINERLY

No. 803SC846

(Filed 3 February 1981)

Robbery § 4.3— armed robbery of grocery store manager — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a black male wearing a stocking mask over his face ran toward the manager of a grocery store who was leaving the store after closing; the man had a gun pointed at the manager; the manager, who was carrying an automatic pistol, turned and fired six times at the man who then fled; approximately an hour later police went to an apartment about six blocks from the store where they found defendant lying on the floor bleeding from gunshot wounds; the apartment was the residence of defendant's aunt; defendant was taken to the hospital where clothes he was wearing, including trousers and tennis shoes, were taken into custody by police; the tread pattern on the bottom of the tennis shoes was found to be similar to a footprint found near a mud puddle behind the store and to other footprints in the area; and no other shootings were reported that evening.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 23 April 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 January 1981.

Defendant was charged with attempted armed robbery in violation of G.S. § 14-87(a) and following a plea of not guilty, the jury found defendant guilty as charged. From a judgment imposing a prison sentence of "fifteen (15) years minimum, twenty (20) years maximum," defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Ward and Smith, by Susan Henri Johnson, for the defendant appellant.

HEDRICK, Judge.

We note at the outset that defendant has failed to follow many of the Rules of Appellate Procedure with respect to the preparation of the record on appeal and the appellant's brief. Counsel apparently has confused "assignments of error" with "exceptions." Nowhere in the record has defendant noted an exception, although in the record where an exception would ordinarily be noted, counsel has caused an "assignment of error" to be placed. Although defend-

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ant purports to set out in the record ten "assignments of error," he has undertaken to bring forward and argue only eight. Only six of the assignments of error brought forward and argued in the brief are supported by an "assignment of error."

Defendant argues, apparently based upon "Assignments of Error Nos. 21 and 22," that the court erred in denying defendant's motion to dismiss. The State offered evidence tending to show the following: At approximately 7:45 p.m. on 1 October 1979, Glen Hale, owner and manager of a Piggly Wiggly grocery store in New Bern, North Carolina, and his wife were leaving the store after closing when a black male wearing a stocking mask over his face, a blue "jogging type sweater" with a hood, brown pants, and brown work gloves, ran toward them. The man had a gun pointed at Hale. Hale, who was carrying a .32 automatic pistol, turned and fired six times at the man, who fled. Approximately one hour later, police went to an apartment at 02310 Craven Terrace, about six blocks from the store, where they found defendant lying on the floor in the living room, bleeding from gunshot wounds. The apartment was the residence of defendant's aunt. On the living room couch, officers found a damp, dark blue hooded sweatshirt with a hole in it and a "browning red stain" on it. Defendant was taken to the hospital emergency room for treatment, where clothes he was wearing, including a pair of brown trousers, a pair of tennis shoes, and the sweatshirt were taken into custody by police. The tread pattern on the bottom of the tennis shoes was found to be similar to a footprint found near a mud puddle behind the store and to other footprints in the area. No other shootings were reported that evening, according to a police investigator. We hold that this evidence is clearly sufficient to require submission of the case to the jury and to support its verdict.

We have carefully examined defendant's remaining arguments which are supported by "Assignments of Error Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20," and we find all to be without merit.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges MARTIN (Robert M.) and CLARK concur.

Williams v. East Coast Sales

ELSIE WILKINS WILLIAMS, ORIGINAL PLAINTIFF v. EAST COAST SALES, INC. AND WACHOVIA BANK & TRUST COMPANY, N.A., ORIGINAL DEFENDANT, AND THOMAS I. DUDLEY, ADDITIONAL DEFENDANT

No. 806SC643

(Filed 3 February 1981)

Appeal and Error § 6.6— denial of motion to dismiss — order not immediately appealable

An order denying defendant's motion to dismiss plaintiff's claim for punitive damages was not immediately appealable.

APPEAL by defendant East Coast Sales, Inc. from *Tillery, Judge*. Order entered 14 February 1980 in Superior Court, BERTIE County. Heard in the Court of Appeals 16 January 1981.

In this action the plaintiff claims that East Coast Sales, Inc. is indebted to her in the amount of \$2,500.00 because it caused her to make expenditures for the purchase and installation of a mobile home on a lot for which East Coast knew or should have known the plaintiff could not get sewage or electrical service. In a second claim for relief, the plaintiff asked that the note and purchase money security agreement, which had been executed in connection with the transaction, be set aside. In a third claim for relief, the plaintiff asked for punitive damages from East Coast because East Coast did not properly advise plaintiff as required by the provisions of Chapter 130 of the General Statutes of North Carolina. The defendant East Coast moved pursuant to G.S. 1A-1, Rule 12(b)(6) that the plaintiff's claim for punitive damages be dismissed. This motion was denied, and the defendant East Coast appealed.

Pritchett, Cooke and Burch, by W. L. Cooke, for plaintiff appellee.

Thomas L. Jones for defendant appellant.

WEBB, Judge.

The threshold question in this case is whether the order denying the defendant's motion to dismiss is appealable. We hold that it is not. The appealability of orders which do not finally dispose of all claims has been passed on many times by the appellate courts in this State. *See Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 261 S.E. 2d 899 (1980); *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Nasco Equipment Co. v. Mason*, 291

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N.C. 145, 229 S.E. 2d 278 (1976); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967); *Beck v. Assurance Co.*, 36 N.C. App. 218, 243 S.E. 2d 414 (1978). These cases interpret G.S. 1-277, G.S. 7A-27, and G.S. 1A-1, Rule 54(b). They hold that unless an interlocutory order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before a final judgment, the order is not appealable. G.S. 1A-1, Rule 54(b) additionally applies in certain cases involving multiple parties or multiple claims. In the case sub judice there are not multiple claims, rather there are three claims which grow from one incident. We have held in *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640 (1979) that the denial of a motion to dismiss is not appealable. That case held that the party whose motion is denied is not injured if he cannot appeal until after a final judgment has been entered. We hold we are bound by *Hankins*.

Appeal dismissed.

Judges MARTIN (Harry C.) and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

Filed 3 February 1981

COMR. OF INSURANCE v. RATE BUREAU No. 8010INS507	Insurance Commission (315)	Reversed & Declared null & void
KEENAN v. KEENAN No. 8029DC488	McDowell (75CVD3)	Affirmed
MASON v. MASON No. 8027DC565	Lincoln (80CVD141)	Affirmed
STATE v. BAILEY No. 8026SC780	Mecklenburg (80CRS5489)	No Error
STATE v. DALE No. 8012SC766	Cumberland (80CRS6954)	No Error
STATE v. DANIELS No. 802SC793	Beaufort (79CRS6898)	New Trial
STATE v. FISHER No. 8012SC777	Cumberland (79CRS56355) (79CRS56368)	No Error
STATE v. FRYER No. 8021SC848	Forsyth (79CR20652)	No Error
STATE v. HAMES No. 8026SC819	Mecklenburg (80CRS08464)	No Error
STATE v. HARPER No. 805SC849	New Hanover (79CRS21303) (79CRS21304) (79CRS21306) (79CRS21241) (79CRS21243) (79CRS21246)	No Error
STATE v. LOWE No. 8026SC763	Mecklenburg (79CRS024847) (79CRS056775)	No Error
STATE v. ORE No. 802SC792	Beaufort (80CRS2069)	No Error
STATE v. ROBERSON No. 808SC808	Lenoir (80CRS422)	No Error
STATE v. ROGERS No. 805SC850	New Hanover (79CRS23531)	No Error
STATE v. SMART No. 8021SC589	Forsyth (79CRS33082)	No Error

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STATE OF NORTH CAROLINA v. JOHNELL PORTER AND KEITH EMERSON ROSS

No. 8026SC698

(Filed 17 February 1981)

1. Criminal Law § 75.7— statements not result of custodial interrogation — Miranda warnings not required

Where defendants were tracked by bloodhound and arrested while hiding under a bridge after a robbery, an arresting officer was asked over the police radio whether a bank bag had been found, one defendant stated that the bank bag was in the car, and the officer then asked, "What bank bag?" and such defendant replied, "The bag from the robbery," such defendant's statements were not the result of in-custody interrogation and were admissible against him although he had not been given the *Miranda* warnings since the first statement was volunteered in response to a radio message not directed to him, and the officer did not reasonably know that his question before the second statement would likely elicit an incriminating statement.

2. Criminal Law § 74.3— in-custody statements incriminating codefendant — spontaneous utterances — competency against codefendant

Where defendant and his codefendant were tracked by bloodhound and arrested while hiding under a bridge after a robbery, an arresting officer was asked over the police radio whether a bank bag had been found, defendant stated the bank bag was in the car, and the officer then asked, "What bank bag?" and defendant replied, "The bag from the robbery," defendant's statements clearly implicated the codefendant since the only natural inference the jury could have made under the circumstances was that both defendant and the codefendant had been involved in the robbery; however, such statements constituted spontaneous utterances by defendant and were admissible against the codefendant even though defendant did not testify at the trial and the codefendant thus had no opportunity to cross-examine him.

3. Robbery § 4.6— armed robbery — guilt of both defendants — sufficiency of evidence for jury

The State's evidence was sufficient for the jury to find that both defendants were guilty of armed robbery where it tended to show that a storekeeper was robbed at gunpoint by more than one person; the robbers fled from the scene of the robbery in a red Dodge Aspen; at least one person left the red Dodge Aspen as it was being pursued by a policeman; officers used a bloodhound to follow the trail of those leaving the red Dodge Aspen for approximately one mile until they found both defendants under a bridge; a .32 caliber revolver was found under the bridge; and one of the defendants referred to a bank bag taken in the robbery in statements made to the officers.

Judge MARTIN (Harry C.) dissenting.

APPEAL by defendants from *Ferrell*, Judge. Judgment entered

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21 January 1980. Heard in the Court of Appeals 3 December 1980.

The defendants were each charged with and indicted for armed robbery. Their cases were consolidated for trial over each defendant's objection.

State's evidence showed that on 5 October 1979, Mr. Hal B. Martin, while working as a clerk at a store in Mecklenburg County, was robbed at gunpoint. During the robbery, Martin was struck on the head and rendered unconscious. When Martin regained consciousness, he saw a customer, Mr. William Lackey, lying on the floor also. Money had been taken, and some sandwich labels and cigarettes were missing.

Lackey testified that he came to the store on the day of the

Wilson next heard his supervisor over the radio asking him if the officers had found a bank bag. When defendant Porter heard this question, he exclaimed, "The bank bag is in the car." Patrolman Wilson then asked, "What bank bag?"; and defendant Porter re-Martin was calling the police.

Lackey described to the police over the phone the car he had seen outside the store. Mr. Joe Wilson, a patrolman for the Mecklenburg County Police Department, testified that as a result of the description and a call from the police dispatcher, he soon after began pursuit of a red Dodge Aspen. Judging by the movement he saw in the vehicle, there appeared to him to be persons in the rear of the vehicle. Patrolman Wilson testified further that after a high speed chase, he ran his vehicle into a ditch to avoid a collision with the red Dodge Aspen. He saw a person leave the Dodge and run into the woods. The Dodge then left the scene.

A bloodhound was brought to the point at which Patrolman Wilson saw a person run into the woods. County officers followed the bloodhound approximately one mile to a spot where both defendants were found under a bridge. A .32 caliber revolver was also found under the bridge. The officers held both defendants at gunpoint until they were handcuffed. Patrolman Wilson then notified the dispatcher by radio that they were holding two suspects.

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plied, "The bag from the robbery."

Both defendants objected to the admission of the statements by defendant Porter referred to above, and a *voir dire* hearing was held. The court made findings of fact based on the evidence and concluded that the statements were spontaneous utterances, not in response to an in-custody interrogation, and allowed Porter's statements into evidence against both defendants.

Further evidence presented by the State showed that on 5 October 1979 Dennis Sink saw a red Dodge Aspen with three black males in it being pursued by a police vehicle. Sink saw the persons in the Aspen throw paper bags from the automobile during the pursuit. Subsequently, he picked up the bags which contained cigarettes and boxes with food labels in them.

Both defendants were convicted of armed robbery and received prison sentences from which they now appeal.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

Assistant Public Defender Lyle J. Yurko for defendant appellant Keith Emerson Ross.

Dozier, Miller & Pollard, by Scott T. Pollard, for defendant appellant Johnell Porter.

HILL, Judge.

We first discuss the assignments of error brought forth by both defendants regarding Patrolman Wilson's testimony as to the statements made by defendant Porter immediately after the two defendants' arrest. Defendant Porter contends that as to him, the testimony should have been excluded under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because his statements were made before he was warned of his right to remain silent. Defendant Ross contends that as to him, the testimony should have been excluded under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), because the extrajudicial statement of a codefendant was used against him without his having a chance to cross-examine the declarant.

The State contends Porter's statements were spontaneous utterances and were so found by the superior court judge, which

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finding is binding on this Court. As such, the State contends the statements were not the result of an in-custody interrogation and are admissible against defendant Porter. The State further contends Porter's statement did not implicate defendant Ross and he may not complain.

[1] We deal first with Porter's contention. It is clear from the record that defendant Porter made his statements to Patrolman Wilson before *Miranda* warnings were given and that the defendants were in custody; but, clearly, the first question coming over the radio from the supervisor was addressed to Patrolman Wilson and not to either defendant. Defendant Porter interrupted the conversation between the two officers and volunteered the location of the bank bag. A volunteered confession is admissible even in the absence of warnings or waiver of rights. *Miranda, supra*.

The issue then becomes whether the next question posed by Patrolman Wilson converts his conversation with Porter into a "custodial interrogation," thus rendering Porter's next statement inadmissible. We conclude that it does not.

Patrolman Wilson had not been at the scene of the robbery. There is no evidence that he knew what was taken at the store. Wilson only later came onto the scene when he pursued the Aspen in his car first and later pursued the defendants with the aid of the bloodhound. It was a natural response by Wilson — and, in our opinion, not to be construed as custodial interrogation — to ask in response to Porter's volunteered statement, "What bank bag?"

Porter contends that when the question was put — however innocently — the police investigation entered into the accusatory stage and that Wilson was required to tell Porter of his right to remain silent. We are not persuaded.

"A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . amounts to interrogation. But since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, ____ U.S. ____, 100 S.Ct. 1682, 64 L.Ed.2d 297, 308 (1980).

This case boils down to whether, in the brief conversation

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between defendant Porter and Patrolman Wilson, the officer should have known that the respondent would suddenly be moved to make an incriminating response. We conclude not, particularly in light of *Innis's* emphasis on the brevity and "off-hand" nature of the policeman's remarks.

Although the facts are somewhat different in the case of *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), *modified as to death penalty* 428 U.S. 904 (1976), the language of Chief Justice Sharp, on page 433, is helpful in the case *sub judice*.

As we said in *State v. Haddock*, 281 N.C. 675, 682, 190 S.E. 2d 208, 212 (1972), '[a] voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the course of appellant's narration, asks defendant to explain or clarify something he has already said voluntarily.' Since there is no evidence here that defendant's statements were made in response to overbearing police questioning or other police procedures designed to elicit a statement, we conclude that they were the product of free choice and without the slightest compulsion of in-custody interrogation procedures. Therefore they were properly admissible. *See Holloway v. U.S.*, 495 F. 2d 835 (10th Cir. 1974); *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973), and cases cited therein; *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973).

Patrolman Wilson was still getting the big picture when he asked "What bank bag?" There was no "focus on the accused," and the officer was not motivated "to elicit a confession." Porter's assignment of error is without merit and overruled.

[2] Next, we deal with the State's contention that defendant Porter's extrajudicial statements did not implicate defendant Ross.

Patrolman Wilson was prepared to testify that when he asked Porter "What bank bag?", Porter said, "The bag *we got* from the robbery," (Emphasis added.) This statement was edited by the trial judge on *voir dire* so that Wilson testified before the jury that Porter said, "The bag from the robbery." We do not believe this editing so sanitized the statement that it did not implicate Ross.

The two defendants were arrested after being chased by a

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bloodhound for approximately one mile. Upon being caught, the two were both handcuffed. When Porter referred to a robbery, we believe the only natural inference the jury could have made at trial is that both men had been involved in the robbery.

Although we hold that the statement implicated Ross, we do not believe it necessarily follows that the statement should have been excluded as to him.

Contrary to defendant Ross's contention, the rule set forth in the *Bruton* case cited would not apply to the case *sub judice* if Porter's statements constituted spontaneous utterances. In *Bruton*, the Supreme Court overruled *Paoli v. United States*, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), saying that it was no longer permissible for a trial court to instruct a jury that while the confession of a defendant could be introduced as competent evidence against that defendant as an exception to the hearsay rule, that such confession could not be considered by the jury against a codefendant *because it was inadmissible hearsay* as to the codefendant. The Court held that, as a practical matter, the jury could not be expected to heed the limiting instruction and would consider against the codefendant the incriminating extrajudicial statement of the defendant, even though as to the codefendant the statement was inadmissible hearsay. The result would be a violation of codefendant's rights granted by the Confrontation Clause.

In the case *sub judice*, if defendant Porter's exclamations can be characterized as spontaneous utterances, they would not constitute inadmissible hearsay as to codefendant Ross. The *Bruton* rule would not apply. For the reasons stated above, if we find that defendant Porter's statements can be characterized as spontaneous utterances, Ross would have no constitutional rights under *Bruton* to cross-examine Porter.

We must determine whether Porter's statements were spontaneous utterances. A spontaneous utterance is a statement which is considered reliable because of its spontaneity. It is considered that if a statement is made in immediate reaction to the stimulus of an occurrence and without opportunity to reflect, it is unlikely that the statement would be fabricated. See 1 Stansbury's N.C. Evidence, § 164, p. 554 (Brandis rev. 1973). It does not matter that the statement is in response to a question. See *State v. Johnson*, 294 N.C. 288, 291, 239 S.E.2d 829 (1978); *State v. Deck*, 285 N.C. 209, 214, 203 S.E.2d 830 (1974).

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In the case *sub judice*, there is evidence that both defendants had just been involved in a high speed automobile chase; they had been tracked on foot for approximately one mile by officers with a bloodhound; and they had been brought from under a bridge at gunpoint and handcuffed. At that time a voice on the radio asked Patrolman Wilson whether the officers had found a bank bag. In immediate response to the stimulus of this question, defendant Porter exclaimed that the bag was in the car. When Officer Wilson asked, "What bag?", Porter responded, "The bag from the robbery."

Defendant Porter was undergoing a traumatic experience. In the excitement of all that was surrounding him, we find that Porter's statements were spontaneous to the extent he was unlikely to have fabricated them. Therefore, for the reasons stated above, we hold Porter's spontaneous utterances were admissible against defendant Ross and that the rule established in *Bruton* predicated admission of extrajudicial statements on the right of a codefendant to cross-examine his codefendant-declarant does not apply and was not violated. Ross's assignment of error as to the admissibility of Porter's statements is overruled.

[3] Both defendants assign as error the denial of their motions to dismiss. The motions to dismiss should have been denied as to each defendant if there was, as to each, substantial evidence of all material elements of the offense. It does not matter whether the evidence is direct or circumstantial. See *State v. Smith*, 40 N.C. App. 72, 252 S.E.2d 535 (1979). In the case *sub judice*, there was evidence that Hal B. Martin was robbed at gunpoint by more than one person; that the robbers fled from the scene of the robbery in a red Dodge Aspen; that at least one person left the red Dodge Aspen as it was being pursued by a policeman; that officers used a bloodhound to follow the trail of those leaving the red Dodge Aspen for approximately one mile until they found both defendants under a bridge; that a .32 caliber revolver was found under the bridge; and that one of the defendants referred to a bag taken in the robbery. We hold that this is substantial evidence from which the jury could find that both defendants participated in the robbery. See *State v. Collins*, 35 N.C. App. 250, 241 S.E.2d 98 (1978). These assignments of error are overruled.

We have examined the other assignments of error brought forward by the defendants and find them to be without merit.

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No error.

Judge WEBB concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

I must respectfully dissent from the majority opinion. The heart of the case is whether defendants suffered prejudicial error by the admission, over objections, of the incriminating statements of Porter, made after he and Ross were arrested. The pertinent parts of the record are not long and are helpful to an understanding of this issue.

After the facts of the armed robbery were established by the witnesses Martin and Lackey, the state called Joe Wilson, Jr., a Mecklenburg County police officer. He testified he received a radio message about the robbery and headed north looking for a suspect vehicle. He located the vehicle, a red 1976 Aspen, followed it at high speed, and finally had to ditch his car to avoid a collision. The Aspen at that point was backing out of a driveway into the highway. He saw a black male run into the woods, and the red car drove off at high speed. Other officers came; they got a bloodhound and a helicopter. The dog took up the trail and they soon came upon two suspects who had covered themselves with a wooden portion of an old bridge. With drawn weapons, the officers ordered the two defendants out from under the bridge. The defendant Porter was handcuffed and was under arrest and had not been advised as to his constitutional rights pursuant to *Miranda*. Wilson radioed his superior officer. The following testimony was taken in the absence of the jury:

Prior to the radio message from Sergeant Burden I had asked Defendant Porter no questions, other than telling the defendants to come out from under the bridge I had no communications with either of them. None of the officers asked them anything else.

QUESTION BY THE COURT:

Q. Tell me what the statement was.

A. "The bag is in the car" and then I asked "what bank bag?" and Defendant Porter replied "the bag from the robbery."

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CROSS EXAMINATION by Mr. Pollard for Defendant Porter:

We were speaking by walkie-talkie and Sergeant Burden heard the message that we had two suspects in custody. The defendant was handcuffed. Mr. Porter had not been read his rights and he was under arrest. After Defendant Porter responded "It is in the car" I asked him the question, "what bag?"

The following testimony was in the presence of the jury:

Sergeant Burden and I were communicating with walkie-talkie radios. After Sergeant Burden asked, "Did you find a bank bag?" defendant Porter replied, as if answering the radio:

....

"The bank bag is in the car." At that time I said, "What bank bag". I was not aware at that time that a bank bag had been taken in the robbery. Then Defendant Porter, responded:

....

"The bag from the robbery"

After Mr. Porter made the statements I made radio announcements stating that the suspects said:

....

"That the bank bag was in the car."

Later, witness Overcash testified:

Then a voice came over the radio asking if there was a bank bag found.

Q. What happened next?

....

A. About that time Porter said it was in the car.

Officer Wilson then said what bag, turkey?

....

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Q. What happened after Officer Wilson said, "What bag, turkey?"

A. I believe Officer Wilson radioed back the suspect said it was in the car.

....

Q. What, if anything, did you hear said after Officer Wilson said, "What bag?"

A. He said it was the one that was taken at the store.

.....

Q. Who said, "The one from the store?"

A. Porter.

During his charge to the jury, the judge stated:

That Wilson talked with Officer Burden by radio and was asked if a bank bag had been found, to which the Defendant Porter said it was in the car, and that upon being asked, "What bag?" stated, "The bag from the robbery."

....

Now, Members of the Jury, there is evidence which tends to show that the Defendant Porter has admitted a fact relating to the crime charged in this case. If you the jury find that the defendant made such an admission, then you should consider all of the circumstances under which it was made in determining whether it was a truthful admission and the weight that you will give to it.

At no time during the trial did the trial judge give any cautionary or limiting instruction to the jury concerning how they should consider the testimony of Porter.

ROSS'S APPEAL

The statements by Porter allowed into evidence over Ross's objections are extremely prejudicial to Ross, and their admission is reversible error. The statements admit the very crime charged, even though redacted to some extent. The very effort to "sanitize" the statements as to Ross indicates their prejudicial nature.

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Porter, the out-of-court declarant, did not testify in the trial. Ross had no way to cross-examine Porter. Ross's right of cross-examination, secured by the Confrontation Clause of the sixth amendment of the United States Constitution and section 23 of article I of the Constitution of North Carolina, was violated by the admission of this testimony. *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968); *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968); *State v. Johnson*, 29 N.C. App. 534, 225 S.E.2d 113 (1976).

I cannot say that the erroneous admission of the testimony was harmless error beyond a reasonable doubt. The evidence against Ross was primarily circumstantial. There is a reasonable possibility that the evidence complained of contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171 (1963).

The majority in effect holds that if the extrajudicial statement is credible and reliable, the non-declarant defendant's rights to cross-examination have been fulfilled and there is no violation of the *Bruton* rule. This is the reverse of the purpose of cross-examination. It is the credible witness whom the defendant needs to cross-examine. Where the testimony is so incredible as to be unbelievable by a jury, defendant may well waive his right to cross-examine. At the very least, constitutional rights cannot be made to turn on whether this Court, or any other, is of the opinion that the extrajudicial statement is credible. Further, the opinion implies that *Bruton* is limited to "confessions." *Bruton* itself states that its rule applies to a context "where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial." 391 U.S. at 135-36, 20 L. Ed. 2d at 485 (emphasis added). A thorn bush by another name is just as prickly. Constitutional rights cannot be determined by the name tag given to the prejudicial extrajudicial statement.

In my opinion *Bruton* is applicable to this case, and Ross is entitled to a new trial.

PORTER'S APPEAL

I vote a new trial for Porter because of the vital incriminating question put to him by the officer while in custody and without complying with the *Miranda* rules. The majority says officer Wilson was "still getting the big picture" and that there "was no focus on the accused" when the question was put to defendant. Wilson had

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knowledge of the armed robbery and some description of the car involved. He had chased the car, saw a man run into the woods, tracked the man with a bloodhound that unerringly identified Porter with its nose, found Porter hiding, and arrested him with drawn weapon. Porter was handcuffed, under arrest and in custody. Surely, Wilson believed that he had handcuffed one of the robbers.

It is true that Porter's first statement, "the bag is in the car," apparently was a response to a radio message not directed to him. That statement alone was ambiguous; it could have referred to any type "bag." Then, however, without any compliance with *Miranda*, Wilson asked Porter "What bank bag?" or "What bag, turkey?" and Porter replied, "the one that was taken at the store" or "the bag from the robbery." All the quoted statements were before the jury. Wilson further testified that when he asked Porter the question about the bag, he (Wilson) did not know that a bank bag had been taken in the robbery.

Although the first statement by Porter made in response to the radio transmission was volunteered and can be fairly categorized as spontaneous, and therefore is not protected by *Miranda*, the subsequent question and answer of defendant certainly violated Porter's constitutional rights as set out in *Miranda*. Clearly, all the elements invoking *Miranda* procedures were present: defendant was in custody, handcuffed; from the circumstances of the chase, tracking and arrest, suspicion was properly focused on Porter. Officer Wilson referred to him as a "suspect" when Porter was arrested. Porter was entitled to be advised of his rights under *Miranda* before he was asked the question, "What bag, turkey?" and made his devastating reply. Officer Wilson reasonably knew that any answer by Porter would be incriminating. That was why he asked the question. According to Wilson, he used the words "What bank bag?" He wasn't inquiring about just any bag but a bank bag in connection with an armed robbery.

By the failure to safeguard Porter's constitutional rights, prejudicial error was committed and he is entitled to a new trial.

Kent v. Humphries

MELODY KENT v. FLETCHER HUMPHRIES AND H & W PLASTICS, INC.

No. 801SC476

(Filed 17 February 1981)

1. Frauds, Statute of § 1— statute of frauds inapplicable

Plaintiff's claims of fraud, unfair trade practices, and nuisance, not sounding in contract, were not precluded by the statute of frauds, G.S. 22-2, since that statute is an affirmative defense to recovery on an oral contract of lease for a period in excess of three years.

2. Frauds, Statute of § 6— five year oral lease — statute applicable

Summary judgment was properly entered for defendant on plaintiff's contract claim because the oral five year lease upon which plaintiff's claim necessarily relied was void as a matter of law under the statute of frauds, and a written lease, tendered and signed by defendant but not signed by plaintiff, could not be admitted as a partial memorandum of the oral lease, to be aided by parol evidence, since plaintiff's own deposition established the inconsistencies between the oral lease under which she sought to recover and the written lease she offered as a memorandum thereof, and the written lease did not contain the alleged covenant not to operate a plastics plant in the same shopping center in which plaintiff operated a beauty shop.

3. Landlord and Tenant § 15— property right in premises for period rent paid — tenant's action for nuisance

Where plaintiff entered premises under a void lease and was therefore a tenant at will, she nevertheless had a fixed property right in the premises during the period for which she had already paid rent; therefore, plaintiff's nuisance claim would have to stand or fall on a determination of whether, at the time she vacated the premises on 3 March 1978, defendant had already accepted rent from her for that portion of March, and this was a genuine issue of material fact to be determined by a jury.

4. Fraud § 12— lease of shopping center space — fraud by landlord — summary judgment improper

The trial court erred in entering summary judgment for defendant on plaintiff's claim of fraud where plaintiff alleged that defendant represented to her that he would not operate a plastics plant in the shopping center area where she intended to lease space for a beauty shop; plaintiff alleged that she would not rent space in the shopping center if the plastics plant was nearby; defendant represented to a third person, before his dealings with plaintiff, that he intended to operate a plastics plant in the shopping center; and plaintiff's reliance on defendant's alleged representation appeared from her complaint and deposition to have resulted in considerable loss to her due to the expense of outfitting the beauty shop only to be forced to abandon it soon thereafter and from her entry into long-term contracts based upon her continued occupancy of the beauty shop premises.

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5. Unfair Competition § 1— rental of commercial property — trade or commerce

The rental of commercial property is trade or commerce within the meaning of G.S. 75-1.1, and plaintiff's complaint and depositions which were sufficient to support a fraud claim would also support her claim for unfair or deceptive acts or practices.

6. Rules of Civil Procedure § 37— expenses incurred in compelling discovery — denial of attorney's fees improper

The trial court erred in denying plaintiff attorney's fees for the expense of compelling discovery where the trial court's justification bore no relation whatsoever to the matter before it on the hearing on plaintiff's motion to compel, and the court was required by the mandatory language of G.S. 1A-1, Rule 37(a)(4) to order defendant to pay plaintiff's attorney's fees.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiff from *Brown, Judge*, of summary judgment on claims of fraud, breach of contract of lease, unfair trade practices, and nuisance; and of order granting defendants leave to amend their answer to plead the statute of frauds. Both entered 18 January 1980. Appeal by plaintiff from *Small, Judge*, of order denying plaintiff attorney's fees for the expense of compelling discovery, said order entered 11 April 1979 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 11 November 1980.

On 28 April 1978, plaintiff Melody Kent filed a complaint alleging fraud, unfair trade practices, breach of lease, and nuisance. Her action was instituted against defendant Fletcher Humphries and his fiberglass manufacturing enterprise, defendant H & W Plastics, Inc., based upon defendants' manufacture of plastic and fiberglass products in defendant Humphries' shopping center in Moyock, where plaintiff rented space and operated a beauty shop. Plaintiff alleged that in August 1976 she and defendant Humphries had orally agreed to a five-year lease at a fixed rental of \$113-\$115 per month, with the option to renew for an additional five years. Plaintiff was to complete the interior of the leased space. Plaintiff further alleged that defendant had represented to her that he would not operate the plastics plant in or around the shopping center and, when plaintiff's husband discovered in January 1977 that defendant was engaged in plastics and fiberglass manufacture behind the shopping center, that defendant represented to her husband that he would cease manufacture within three months, well before plaintiff was to move into her beauty shop space.

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Plaintiff alleges that she moved into the leased area and began to operate her beauty shop on 1 April 1977, and that on that date, defendant Humphries tendered a written and signed five-year lease which plaintiff refused to sign because it varied materially from the terms of the oral agreement in that it required higher rent, required that she leave behind all heating and air conditioning equipment upon termination, failed to include defendant Humphries' oral promise not to operate H & W Plastics in the vicinity of the shopping center, and did not contain the agreed upon floor space. Plaintiff alleges that the noxious chemical fumes from the defendant's manufacturing activities made her physically ill and eventually forced her to vacate the premises. She alleges personal injuries, loss of profits, loss of the value of her improvements to the rented space, and losses on long-term contracts entered into in consequence of her occupancy in the shopping center.

Plaintiff filed two sets of interrogatories and several requests to produce documents. Defendant failed to answer certain interrogatories and to produce certain documents. Plaintiff filed a motion to compel discovery seeking attorney's fees and expenses under G.S. 1A-1, Rule 37. Judge Small granted the motion to compel discovery and also granted expenses, but denied attorney's fees.

Plaintiff filed a request for admissions with explanatory interrogatories on 1 November 1979 to which defendant responded by filing a motion for a protective order, alleging that this additional discovery was repetitious and intended solely to harass defendant.

Defendant moved for summary judgment on 29 November and plaintiff moved to compel discovery on 4 December 1979. At the hearing on all these motions, defendants moved to amend their answer to plead the statute of frauds, G.S. 22-2.

On the motion for summary judgment, Judge Brown had before him the pleadings, several affidavits, answers to interrogatories, certain documents, and the depositions of plaintiff Melody Kent, defendant Fletcher Humphries, and Larry Bryant, a former employee of defendant H & W Plastics, Inc.

Plaintiff's deposition and affidavit corroborate the factual allegations in her complaint and suggest that she suffered headaches, chest pains, disorientation, nausea, and hallucinations as a result of her exposure to defendants' chemical fumes, that plaintiff's husband made the improvements necessary for the operation of a

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beauty shop in plaintiff's rented space in the shopping center, and that plaintiff did not herself inspect the premises or observe that the defendants' manufacturing process was being carried out thereon until after taking possession of the rented space. The deposition of Larry Bryant tended to show that in early 1976 defendant Humphries represented to Bryant that he intended to maintain a plastics and fiberglass operation at the shopping center, and that plaintiff complained about defendants' chemical fumes on several occasions.

Humphries, in his deposition, stated that he had at all times intended to operate his plant on the shopping center premises and had never told plaintiff otherwise.

Judge Brown granted defendants' motion to amend and then granted defendants' motion for summary judgment as to all claims.

Sanford, Adams, McCullough & Beard by J. Allen Adams and Catharine B. Arrowood for plaintiff appellant.

White, Hall, Mullen, Brumsey & Small by Gerald F. White and William Brumsey, III for defendant appellees.

CLARK, Judge.

[1] Plaintiff first argues that the amendment of defendants' answer to plead the statute of frauds was irrelevant to her claims of fraud, unfair trade practices, and nuisance. We agree. The statute of frauds, G.S. 22-2, is an affirmative defense to recovery on an oral contract of lease for a period in excess of three years. The statute of frauds, then, even if properly pleaded and proven, could do no more than bar plaintiff's recovery on her contractual claim. Her claims of fraud, unfair trade practices, and nuisance, not sounding in contract, were thus not precluded by G.S. 22-2. Whether there were other grounds for summary judgment as to these three claims will be discussed after an examination of the propriety of the granting of summary judgment as to plaintiff's contract claim.

We are presented with two versions of the agreement of lease: the written lease, signed by Humphries, and the earlier oral lease. We believe plaintiff is precluded from relying on the written lease because her own deposition testimony reveals that the written lease was no more than a proposal by defendant, that plaintiff found the proposal unacceptable because it varied from the parties' earlier

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oral agreement, that because it varied from the oral agreement she refused to sign it, and that she considered the earlier oral lease in effect. For plaintiff to succeed on her contract claim then, she would have to rely on the oral lease.

[2] Plaintiff may not rely on the oral lease, however, because it is barred by the statute of frauds, G.S. 22-2, which provides that, "all . . . leases and contracts for leasing land exceeding in duration three years . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged" Plaintiff suggests that the written lease, which she refused to sign, should be admitted as a partial memorandum of the oral lease, to be aided by parol evidence. We disagree. Were the memorandum plaintiff offered merely sketchy, we believe that details not included in the writing could properly be supplemented by parol testimony, *see, e.g., McGee v. Craven*, 106 N.C. 351, 11 S.E. 375 (1890); but to qualify as a memorandum to take an oral lease out of the statute, the writing must, at the very least, show all of the essential elements of the agreement, *see Hall v. Misenheimer*, 137 N.C. 183, 49 S.E. 104 (1904), and those elements set out in the writing must not contradict the terms of the oral lease sought to be proved, *see Keith v. Bailey*, 185 N.C. 262, 116 S.E. 729 (1923). Plaintiff, in her own deposition, establishes the inconsistencies between the oral lease she seeks to recover under, and the written lease she offers as a memorandum thereof. As noted by our Supreme Court in a somewhat similar case:

"The plaintiff cannot recover on the memorandum or receipt (even if it be otherwise sufficient), because it does not embody the entire contract, nor on the agreement to which he testified at the trial, whether considered independently of or in connection with the receipt, because in either event is there no written note or memorandum signed by the party to be charged and embracing all the essential terms of the contract which the evidence tends to establish."

Id. at 264, 116 S.E. at 730.

We note further that even if the writing were allowed to take the oral lease out of the statute of frauds, the writing does not contain the alleged covenant not to operate a plastics plant in the shopping center. "Covenants limiting the use of real property are

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within the scope of the statute of frauds," *Herring v. Merchandise, Inc.*, 249 N.C. 221, 226, 106 S.E. 2d 197, 201, 78 A.L.R. 2d 927, 932 (1958), and such a covenant not included in a written lease cannot be proved by parol testimony, *Sakellaris v. Wyche*, 205 N.C. 173, 170 S.E. 638 (1933). Plaintiff therefore could not recover for breach of defendant Humphries' alleged covenant even if the lease were proved.

Since the writing is not allowed, and the lease is void, plaintiff has no underlying contract upon which to base an implied covenant of quiet enjoyment. Although "[e]very demise implies a warranty for quiet enjoyment, unless the contrary be expressed . . .," *McKesson v. Mendenhall*, 64 N.C. 502, 505 (1870), plaintiff is precluded in this action from proving the demise, and thus from implying the covenant. See 49 Am. Jur. 2d *Landlord and Tenant* § 330 (1970).

We hold that summary judgment on plaintiff's contract claim was properly entered because the five-year lease upon which plaintiff's contract claim necessarily relied was void as a matter of law under the statute of frauds, G.S. 22-2. We agree with plaintiff, however, that the statute of frauds is a good defense only to the claims based in contract, and must now examine plaintiff's other claims to determine whether summary judgment was properly entered in each case.

[3] For plaintiff to recover in nuisance, she must show an unreasonable interference with the use and enjoyment of her property. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 923 (1949). In deciding appeal of a summary judgment, we must consider all pleadings, affidavits, and depositions in the light most favorable to plaintiff. *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976). Taken in the light most favorable to her, plaintiff's deposition clearly establishes an interference with her use and enjoyment of the beauty shop. Reasonableness of the defendants' interference is a factual question that must go to the jury *if* plaintiff held a sufficient property right in the rented space to otherwise support a nuisance action. Defendants point out that plaintiff was no more than a tenant at will by virtue of her entry under a void lease and argue that since Humphries had the right to terminate the tenancy *instantly*, his constructive eviction of her by the maintenance of the plastics plant and the emission of noxious vapors was not inconsistent with the very limited property rights she held as a tenant at will.

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We first note, with regret, that defendants are correct in characterizing plaintiff's tenancy as one at will. We believe the better reasoned and more modern view would be that plaintiff's tenancy at will was converted into a tenancy from month-to-month when she began paying a monthly rental. We believe such a view would more fairly distribute the rights and liabilities of landlord and tenant when a tenant enters premises under a lease unaware that it is void under the statute of frauds and begins paying rent in accord with the void lease. As a tenant from month-to-month, plaintiff would have been entitled to seven days' notice, under G.S. 42-14, before the tenancy could be terminated, and would clearly have a sufficient property right to support an action in nuisance where, as here, her use of the property was disturbed during a period and without the required notice. Most modern authorities suggest that entry under a lease void under the statute of frauds creates a periodic tenancy, usually based on the rental period. *See* Restatement (Second) of Property, Landlord and Tenant § 2.3 (1977); 1 American Law of Property § 3.27 (A.J. Casner ed. 1952); 49 Am. Jur. 2d *Landlord and Tenant* §§ 48-50 (1970). The majority of jurisdictions follow the rule that payment of rent under the void lease converts the tenancy at will to a periodic tenancy. Annot., *Character and Duration of Tenancy Created by Entry Under Invalid or Unenforceable Lease*, 6 A.L.R. 2d 685 (1949).

Dicta in two North Carolina cases have suggested that our Supreme Court would follow the majority rule. *See Ingram v. Corbit*, 177 N.C. 319, 99 S.E. 18 (1919) (Clark, C.J.); *Barbee v. Lamb*, 225 N.C. 211, 34 S.E. 2d 65 (1945). At least one authority appears to have been misled by these dicta. *See* J. Webster, *Real Estate Law in North Carolina* § 80 (1971) ("if the lessee goes into possession under such unenforceable lease and pays the rent pursuant to the agreement, a tenancy from period to period is created." Citing *Ingram, supra.*) These dicta and Professor Webster's statement, however, are contradicted by square holdings in two other cases to the effect that, regardless of the landlord's acceptance of rental payments, the tenancy is never converted into one from period-to-period, but remains a tenancy at will. *Mauney v. Norvell*, 179 N.C. 628, 103 S.E. 372 (1920) (Clark, C.J.); *Davis v. Lovick*, 226 N.C. 252, 37 S.E. 2d 680 (1946). This Court has followed these precedents once before, *Stout v. Crutchfield*, 21 N.C. App. 387, 204 S.E. 2d 541, cert. denied, 285 N.C. 595, 205 S.E. 2d 726 (1974), and although we now question whether this rule adequately recognizes the interest and expecta-

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tions of tenant as well as landlord, we are constrained to continue to follow the rule until our Supreme Court is faced with an appropriate set of facts to allow it to reconsider and, in its wisdom, change the rule.

As a tenant at will, the plaintiff's interest in the property could be terminated *instantly* by defendant. *Barbee v. Lamb, supra*; *Davis v. Lovick, supra*. See Webster, *supra*, § 96; Strong's N.C.

Index 3d, *Landlord and Tenant* § 15 (1977). Thus the defendant suggests that the constructive eviction of plaintiff was within defendant's rights under the tenancy at will and could come at any time. We cannot go so far.

We believe that even under a tenancy at will the method of paying the rent is significant. The significance of the method of payment is not that the defendant should be finally estopped by his acceptance of payments from ever asserting his rights under the tenancy at will, see *Mauney v. Norvell*, 179 N.C. at 630, 103 S.E. at 373, but rather that he might be estopped from asserting those rights if he had already accepted rent for the period during which he constructively evicted his tenant at will. If defendant received his rent in arrears, we are inclined to agree with defendant that he could demand possession *instantly*, at any time during the tenancy; however, if defendant received rent in advance, we believe he should be estopped from asserting the character of the tenancy at will as a defense to an action for nuisance. Even as a tenant at will, plaintiff's payment of rent in advance should secure for her a sufficient property right in the premises, at least for the period for which defendant accepted the rent, to support her nuisance claim.

We do not see this interpretation of plaintiff's rights as inconsistent with her status as a tenant at will. Defendant may still terminate the tenancy *instantly*, but not during a period for which he has already accepted rent. He could refuse to accept rent tendered at the first of the month for the coming month without notice and demand immediate possession of the premises; such is the essence of a tenancy at will. He could not, however, accept rent for the coming month and then terminate the tenancy in the middle of that month. Even under a tenancy at will we believe a tenant has a fixed property right in the premises during the period for which she has already paid the rent.

The record indicates that plaintiff vacated the beauty shop

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premises on 3 March 1978. Under the foregoing analysis plaintiff's nuisance claim must stand or fall on a determination of whether at that time defendant had already accepted rent from plaintiff for that portion of March. This is a genuine issue of material fact. If the rent was paid in advance, then plaintiff will be entitled to maintain her action for nuisance subject to a determination by a finder of fact of the reasonableness of defendant's interference with her property right.

[4] Summary judgment on plaintiff's fraud claim was improperly entered. To overcome defendants' motion, plaintiff needed only to forecast evidence (1) that defendant made a definite and specific representation to her that was materially false; (2) that defendant made the representation with knowledge of its falsity; and (3) that plaintiff reasonably relied on the representation to her detriment. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

Plaintiff's deposition tended to show that in August 1976 defendant represented to her that he would not operate a plastics plant in the shopping center area. Her statement in the complaint and again in her deposition that she would not rent space in the shopping center if the plastics plant was nearby establishes the materiality of this representation.

The requirement that the representation be made with knowledge of its falsity is satisfied by the deposition testimony of Larry Bryant, which tends to show that defendant represented to Bryant in early 1976 ("getting close to the summer"), that he intended to operate a plastics plant in the shopping center. Although a statement of future intent will not ordinarily support an action for fraud, *Pierce v. Insurance Co.*, 240 N.C. 567, 83 S.E. 2d 493 (1954), where it appears that the promisor at the time of making the representation of future intent, in fact had no intention of complying therewith, the state of mind of the promisor is a subsisting fact such as will support an action in fraud. See *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131, 40 A.L.R. 2d 966 (1953).

Plaintiff's reliance on defendant Humphries' alleged representation appears from her complaint and deposition to have resulted in considerable loss to her due to the expense of outfitting the beauty shop only to be forced to abandon it soon thereafter and from her entry into long-term contracts based upon her continued occupancy of the beauty shop premises. Whether her reliance was reasonable

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must be left to the jury. We hold that reliance on defendant's representations could not be held unreasonable as a matter of law, so as to support an entry of summary judgment, in light of the statements by plaintiff in her deposition that "At the time I occupied my space on April 1, 1977, I didn't know H & W Plastics was in there."

[5] Plaintiff's claim for treble damages under G.S. 75-16 for unfair trade practices should have survived defendants' motion for summary judgment. G.S. 75-1.1 defines unfair trade practices as "unfair or deceptive acts or practices in or affecting commerce." Our holding that plaintiff's depositions support her fraud claim necessitates our holding that the depositions likewise support her claim for "unfair or deceptive acts or practices." *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). This Court has previously held that "the rental of residential housing is 'trade or commerce' under 75-1.1." *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E. 2d 574, 583 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). We hold that if the renting of residential property satisfies the "in or affecting commerce" language of G.S. 75-1.1, then *a fortiori* the renting of commercial property must similarly satisfy the statutory requirement.

We conclude that the trial court's entry of summary judgment for defendants on plaintiff's claims of nuisance, fraud, and unfair trade practices must be reversed.

Plaintiff argues that the trial court abused its discretion in granting defendants' motion to amend their answer to plead the statute of frauds. We have examined the circumstances surrounding the defendants' motion to amend and in light of the admonition of G.S. 1A-1, Rule 15(a) that leave to amend "shall be freely given," cannot say that the trial court's granting of said motion constituted a clear abuse of discretion. Plaintiff's assignment of error to the granting of the motion to amend defendants' answer is overruled.

Plaintiff's final two assignments of error relate to her considerable difficulty in compelling discovery of defendants.

[6] Plaintiff's first motion to compel discovery was based on defendants' failure to respond to plaintiff's first set of interrogatories, their incomplete responses to plaintiff's second set of interrogatories, and their failure to produce certain requested documents. This motion was granted in an order by Judge Small after a hearing

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on the matter. The order, entered 11 April 1979, granted plaintiff the expenses incurred in compelling discovery, but denied plaintiff attorney's fees. G.S. 1A-1, Rule 37(a)(4) provides that when a motion to compel discovery is granted, "the court shall . . . require the party . . . whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, *including attorney's fees, unless the court finds that the opposition to the motion was substantially justified* or that other circumstances make an award of expenses unjust." (Emphasis added.) The judge recited in the order that the opposition was substantially justified under Rule 37(a)(2) which provides, "When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before he adjourns the examination in order to apply for an order." The judge fails to explain how this provision of Rule 37 could possibly justify defendant's failure to answer. We hold that it could not. The provision quoted in the order is clearly applicable only to a Rule 30 "deposition on oral examination." This motion was based on a failure to produce documents under Rule 34 and to answer interrogatories under Rule 33. Since the asserted justification bears no relation whatsoever to the matter before the court on the hearing on the motion to compel, the court was required by the mandatory language of Rule 37(a)(4) to order defendant to pay plaintiff's attorney's fees. The court erred in failing so to order.

Plaintiff's second motion to compel discovery was based on defendants' failure to respond to plaintiff's requests for admissions and explanatory interrogatories. Defendants had previously filed a motion for a protective order on the grounds that these requests for admissions and interrogatories were repetitious and intended primarily to harass defendants. The trial court heard arguments on these two motions along with arguments on the summary judgment motion. The court granted the summary judgment motion, but failed to rule on the motions for protective order and to compel discovery. In light of our holding that plaintiff's claims for fraud, unfair trade practices, and nuisance ought to go to trial, the trial court will need to hold a hearing and make a ruling on these motions before proceeding on plaintiff's remaining claims.

Summary judgment as to plaintiff's claim for breach of contract of lease is affirmed. Summary judgment on plaintiff's claims for nuisance, fraud, and unfair trade practices is reversed and

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remanded. The order of 18 January 1980 granting defendants' motion to amend their answer to plead the statute of frauds is affirmed. The order of 11 April 1979 granting plaintiff's motion to compel discovery is remanded with instructions that it be amended to award plaintiff reasonable attorney's fees.

Affirmed in part; reversed and remanded in part.

Judge WHICHARD concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK dissenting.

In my opinion, plaintiff's property interest is not such as would allow her to maintain her claim for nuisance.

AMERICAN FOODS, INC. v. GOODSON FARMS, INCORPORATED, AND J.
MICHAEL GOODSON

No. 805SC638

(Filed 17 February 1981)

1. Mortgages and Deeds of Trust § 32.1— action to recover on note — no protection of deficiency judgment statute

In an action to recover on a note, the trial judge did not err in denying defendants' motion for summary judgment and in striking defendants' defense that they were entitled to the protection afforded by G.S. 45-21.38 which prohibits deficiency judgments on purchase money transactions, since the note in this case did not indicate on its face that it was a purchase money instrument; title to the real estate was taken only in the name of a corporation capitalized by plaintiff and it was foreclosed in an action against that corporation only; defendants had no record title interest in the land acquired by foreclosure; and the endorsements by defendants were nothing more than additional collateral which were required by plaintiff seller.

2. Mortgages and Deeds of Trust § 32.1— action to recover on note — no protection of deficiency judgment statute

In an action to recover the balance due on a note where the purchase agreement between plaintiff and defendant provided that plaintiff would sell to defendant certain land together with crops, machinery and miscellaneous inventories, that plaintiff would convey to defendant stock in a wholly owned subsidiary, that, upon request of defendant, plaintiff would cause a corporation known as Lewis Nursery to be capitalized and would transfer the assets described in the purchase agreement to the corporation, and that stock in the newly organized

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corporation would then be transferred to defendant for the same purchase price, and a note payable to plaintiff was executed by the Nursery and defendants and was secured by a deed of trust on the land in question, there was no merit to defendants' contention that they were comakers under the note and as such were entitled to the protection against deficiency judgments provided by G.S. 45-21.36, since the protection of that statute is limited to persons who hold a property interest in the mortgaged property, and defendants in this case did not hold a property interest in the land in question, title to which was recorded in the name of Lewis Nursery.

3. Bills and Notes § 20— action to recover on note — amount of recovery

In an action to recover on a note, there was no merit to defendants' contention that the trial court's award to plaintiff was not supported by the evidence where there was a difference of \$3,692 between the relief requested in plaintiff's complaint and the amount set forth as owing in plaintiff's vice-president's affidavit, since such a trivial variance, less than one-half of a percentage point of the amount awarded, was not crucial, particularly where the variance favored defendants.

4. Vendor and Purchaser § 8— vendor's failure to comply with purchase agreement — buyer's counterclaim dismissed

In an action to recover on a note where defendants counterclaimed asserting breach of the parties' purchase agreement by plaintiff for its failure to deliver stock in a wholly owned subsidiary, the trial court did not err in dismissing defendants' counterclaim since the purchase agreement provided that the stock of the subsidiary would be transferred only after appropriate consent was given by another corporation with which seller jointly owned the subsidiary; the other corporation would not consent to the transfer of the stock; the parties attempted to negotiate a new agreement for the transfer but were unsuccessful; and plaintiff therefore had no further obligation to transfer the stock to defendants.

5. Attorneys at Law § 7.4— action on note — award of attorney fees proper

In an action to recover on a note which provided that, if any amount payable was collected through an attorney, the maker agreed to pay to the holder a reasonable amount as costs, attorney and collection fees, plaintiff was estopped to claim 15% of the outstanding balance owing on the note, as provided by G.S. 6-21.2, since plaintiff's attorney filed an affidavit setting out that the services he had rendered were worth \$4,140; the trial judge awarded the attorney \$4,500; and both amounts were substantially less than the amount provided by the statute.

Judge WELLS concurring in part and dissenting in part.

APPEAL by both plaintiff and defendant from Llewellyn, Judge. Judgment entered 8 February 1980 in Superior Court, PENDER County. Heard in the Court of Appeals 15 January 1981.

This is an action to recover the balance due on a note. Pursuant to the terms of a Purchase Agreement dated 30 June 1978, plaintiff contracted to sell to Goodson Farms, Inc. (hereinafter Goodson

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Farms), approximately 859 acres of land in Pender County together with crops growing on the lands, certain machinery and equipment, and miscellaneous inventories and supplies. In addition, plaintiff agreed to convey to Goodson Farms all of the issued and outstanding stock in a wholly-owned subsidiary known as Hy-Yield, Inc., provided, among other things, appropriate consent was given by Ameribrom, Inc., with which American Foods, Inc., jointly owned Hy-Yield.

The Purchase Agreement further provided that, upon the request of Goodson Farms, plaintiff would cause a corporation known as Lewis Nursery, Inc., to be capitalized and would transfer the assets described above to the corporation. Thereafter, the stock in the newly organized corporation would be transferred to Goodson Farms for the same purchase price. (Apparently, the purpose of the transfer of stock to Lewis Nursery, Inc., and subsequent transfer to Goodson Farms was to pass to the purchaser certain goodwill in the established operating name of the farm operation.)

The Purchase Agreement established the purchase price at \$1,250,000.00. The sum of \$50,000.00 was to be paid at closing. The balance of \$1,200,000.00 was to be evidenced by and paid in accordance with the terms of a promissory note in three installments of \$150,000.00, \$50,000.00 and \$1,000,000.00. The unpaid balance was to bear interest at 8%, payable at maturity. The note was to be secured by a deed of trust on the real estate, and as further security the equipment and inventory were to be pledged under a security agreement. J. Michael Goodson, one of the defendants, agreed to join in the execution of the note as a comaker.

Transfer of the property was made to Lewis Nursery, Inc., and a note payable to American Foods was executed by Lewis Nursery, Inc., Goodson Farms and J. Michael Goodson. The note contained an acceleration clause and further provided that in the event of default, if the note was placed in the hands of an attorney for collection, the makers agreed to pay the holder a reasonable amount for costs, attorney fees and collection fees. Neither the note nor the deed of trust provided on its face that the sale was a purchase money transaction.

The defendants paid \$300,000.00 on the note and then defaulted. Plaintiff accelerated the balance due and filed complaint, claiming \$991,150.00, together with interest at 8% on \$1,200,000.00, plus

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attorney fees at 15% of the principal and interest due.

Defendants filed answer setting forth several defenses and a counterclaim asserting breach of the Purchase Agreement by plaintiff for its failure to deliver the stock in Hy-Yield, Inc. Defendants' Third Defense asserted that they were entitled to the protection afforded by G. S. 45-21.38 which prohibits deficiency judgments on purchase money transactions. Defendants' Fourth Defense was based on the provisions of G.S. 45-21.36 which, if applicable, would require plaintiff to account in full for the fair value of the land it acquired at its own foreclosure sale which had been completed during the pendency of the suit *sub judice*. (During the pendency of the case, the plaintiff caused the deed of trust to be foreclosed and submitted the last and highest bid.) Plaintiff thereupon moved to strike the defendants' Third and Fourth Defenses as set forth in the answer.

Plaintiff filed a reply to defendants' counterclaim and a motion to dismiss the counterclaim. Thereafter, plaintiff moved for summary judgment as to defendants' counterclaim, and the defendants filed an affidavit in opposition to plaintiff's motion on the counterclaim. Plaintiff's counsel also filed an affidavit setting forth in detail the services and time involved in support of his claim for attorney fees.

The trial judge on 28 January 1980 heard the motions and thereafter entered two orders. One order struck the defendants' Third and Fourth Defenses. The second order granted summary judgment in favor of the plaintiff in the sum of \$192,443.30 plus accrued interest of \$3,985.80, and accrued interest at 10% until paid. The order also dismissed defendants' counterclaim and allowed plaintiff's attorneys \$4,500.00 as attorney fees rather than the 15% of principal and interest due claimed by plaintiff. Both plaintiff and defendants appealed.

Murchison, Fox & Newton, by Wallace C. Murchison and William R. Shell, for plaintiff appellee-appellant.

Poisson, Barnhill, Butler & Britt, by L. J. Poisson Jr., for defendant appellant-appellees.

HILL, Judge.

[1] Defendants contend the trial judge erred in denying their

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motion for summary judgment and in striking their Third Defense. Defendants cite as support for their contention G. S. 45-21.38, which reads, in pertinent part, as follows,

In all sales of real property by mortgagees . . . under powers of sale, contained in any mortgage or deed of trust executed after February 6, 1933, . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee . . . or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate:

The defendants contend this statute must be read in conjunction with *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979).

In *Realty*, the defendant purchased certain real estate from the plaintiff. As a part of the purchase price the defendant purchaser delivered to the plaintiff seller a purchase money note and deed of trust covering the property conveyed. Upon default, instead of foreclosing on the deed of trust, plaintiff instituted an action against the defendant upon the promissory note. The Supreme Court held that the defendant purchaser was entitled to the protection of G. S. 45-21.38 because the defendant was a purchase money mortgagor and that plaintiff seller could not avoid the provisions of the statute by abandoning its security in the real property and substituting a suit on the underlying note.

Justice Britt, speaking for the Court, at page 373, said:

Having in mind the purpose for which G. S. 45-21.38 was adopted, the perceived problem which the statute seeks to remedy and the effect which a literal construction of the statute produces, we are compelled to construe the statute more broadly and to conclude that the Legislature intended to take away from creditors the option of suing on the note in a purchase money mortgage transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent.

The case *sub judice* is distinguishable from *Realty*. In that case, the collateral consisted of real estate only. In *Realty* the note and

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deed of trust each indicated on its face that it was a purchase money instrument. No such indication appears on the note in the instant case. In the case *sub judice*, title to the real estate was taken in the name of Lewis Nursery, Inc. only, and foreclosed in an action against the Nursery. Unlike the defendants in *Realty*, defendants in the case *sub judice* had no record title interest in the land acquired by foreclosure. (No trust relationship is alleged or in evidence.) The endorsements by the defendants were nothing more than additional collateral which were required by the plaintiff. We conclude that the trial judge did not err in denying defendants' motion for summary judgment and by striking defendants' Third Defense.

[2] Defendants next contend the trial judge erred in striking their Fourth Defense. Defendants rely upon G. S. 45-21.36, which provides, in pertinent part, as follows:

When any sale of real estate has been made by a mortgagee, . . . at which the mortgagee, . . . becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, . . . shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: (Emphasis added.).

The record in this case reveals that American Foods began a foreclosure suit under the deed of trust and became the last and highest bidder. The net proceeds from the sale were applied toward payment of the note, leaving a balance due. Defendants contend they were comakers under the note and as such are entitled to the protection against deficiency judgments provided by G. S. 45-21.36.

In *Trust Co. v. Martin*, 44 N.C. App. 261, 264, 261 S.E. 2d 145 (1979), Judge Wells, speaking for this Court, points out that in passing G. S. 45-21.36,

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[T]he General Assembly intended to limit protection to those persons who *held a property interest* in the mortgaged property, and that such protection was not applicable to other parties liable on the underlying debt. (Emphasis added.)

By contending they are comakers and as such are entitled to the defense established by G. S. 45-21.36, defendants are in effect asking this Court to pierce the corporate veil in a unique way. Defendant Goodson is asking us to wrap the corporate cloak of Lewis Nursery, Inc., around him, since he financed the corporation, and conclude that he and Goodson Farms had an equitable interest in the lands, title to which was recorded in the name of Lewis Nursery, Inc. This we cannot do. Defendants did not hold a property interest in Lewis Nursery, Inc. The trial judge did not err by striking defendants' Fourth Defense.

[3] Defendants next assert that the trial court erred in allowing plaintiff's motion for summary judgment in the amount set forth in the court's order. Defendants contend that the award is not supported by the evidence.

Upon examination of the record, it becomes clear that there is a difference of \$3,692.00 between the relief requested in plaintiff's complaint and the amount set forth as owing in plaintiff's vice-president's affidavit. Clearly, such a trivial variance—less than one-half of a percentage point of the amount awarded—is not crucial, particularly when, as in this case, the variance favors defendant. Furthermore,

So long as some demand for relief is made, it apparently is not crucial that the wrong relief has been demanded. Rule 54(c) provides in part that 'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings.'

Shuford, N. C. Civil Practice and Procedure, § 8-5, p. 69 (1975).

Defendants go on to question whether plaintiff was granted the relief to which it is entitled. Defendants contend that the only evidence to support the judgment is the testimony of plaintiff's vice-president, Mr. Wilson. An examination of the record shows, however, that Wilson also filed three affidavits which, together with his

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testimony, show that he was familiar with plaintiff's records concerning the amount owed on the note at issue.

We can find no error with the trial court's order allowing plaintiff's motion for summary judgment in the amount set forth. Plaintiff's evidence supports the order, and defendants have filed no affidavits or introduced any evidence to put the amount in dispute. Defendants have merely made a general denial in their complaint. Such denial, standing alone, is clearly insufficient to avoid entry of summary judgment under G. S. 1A-1, Rule 56.

[4] Nor do we find the court erred in dismissing defendants' counterclaim. The Purchase Agreement provided that:

In addition to the North Carolina Assets, Seller [Plaintiff] hereby agrees to convey to Buyer [Defendant] within 60 days of the Closing Date all of the issued and outstanding capital stock of Hy-Yield, Inc., a Florida corporation and a wholly-owned subsidiary of Seller ("Hy-Yield"); provided, however . . . (ii) appropriate *consent by Ameribrom, Inc. to the change in ownership of Hy-Yield, shall have been obtained* in accordance with the terms of the Joint Venture Agreement between Hy-Yield and Ameribrom, Inc. . . . (Emphasis added.)

It became clear to the parties shortly after closing date that Ameribrom, Inc. would not consent to the transfer of Hy-Yield, Inc. stock under the joint venture agreement of the defendants. The parties attempted to negotiate a new agreement for the transfer, but were unsuccessful. Since the parties were unable to reach a new agreement regarding transfer of the Hy-Yield stock, or modify the purchase agreement, the terms set out still controlled. Inasmuch as Ameribrom would not consent to the transfer of the stock, and plaintiff could not procure Ameribrom's consent to release it from its guarantee of Hy-Yield obligations, both of which were conditions precedent to the transfer of the stock, plaintiff had no further obligation to transfer the stock to the defendants. The counterclaim was properly dismissed.

[5] Plaintiff filed a counter-appeal contending the trial court erred in limiting its award of fees to \$4,500.00.

The note which is the subject of this controversy provides, among other things, that if any amount payable is collected through

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an attorney, the maker agrees to pay to the holder a reasonable amount as costs, attorney and collection fees.

Plaintiff's attorney filed an affidavit, upon request of the trial judge, setting out the services he had rendered and further providing:

Affiant has spent 69 hours in attorney's time on this case in rendering the above described services. Considering the services rendered, the amount involved, the complexity of the case and the result achieved, *Affiant is of the opinion that reasonable attorneys' fees would be in the amount of \$60 per hour for the 69 hours incurred.* (Emphasis added.)

The trial judge awarded the attorney \$4,500.00.

Plaintiff appealed, now contending the award is controlled by G. S. 6-21.2, which provides in part that where, as in this case, a note is collected by an attorney and such note provides for "payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said note,"

Plaintiff is estopped to claim that which the statute provides. The trial judge awarded a fee in excess of that sought by plaintiff. The cross-appeal is dismissed.

The actions of the trial judge are

Affirmed.

Judge ARNOLD concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur in the portion of the majority opinion affirming summary judgment for the plaintiff on plaintiff's claim for recovery under the note and deed of trust.

I concur in the portion of the majority opinion that affirms the order of the trial court in awarding counsel fees.

I dissent from the portion of the majority opinion with respect

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to summary judgment in plaintiffs' favor on defendant's counterclaim. The essence of defendant's counterclaim was that in the purchase agreement, plaintiff promised to convey to defendant Goodson Farms, Inc. all of the outstanding capital stock of Hy-Yield, Inc., a wholly-owned subsidiary of plaintiff, that plaintiff has failed and refused to convey said stock in Hy-Yield to Goodson Farms, Inc., and that plaintiff's failure to do so has resulted in substantial damage to defendant. Defendant introduced materials to substantiate its version of its rights in the counterclaim. Plaintiff responded by asserting that the agreement to convey the stock in Hy-Yield had two conditions: "appropriate consent of Ameribrom, Inc. to the change in ownership of Hy-Yield, shall have been obtained in accordance with the terms of the Joint Venture Agreement between Hy-Yield and Ameribrom, Inc."; and plaintiff "shall have been released from its guarantee of the obligations and duties of Hy-Yield under such joint venture agreement". The material presented to the trial court raises a genuine issue of material fact as to (1) whether the joint venture agreement would in fact require any consent by Ameribrom, Inc. to a change in ownership of Hy-Yield and (2) whether the joint venture agreement had been terminated altogether prior to the institution of this law suit, rendering the guaranty condition of the purchase agreement moot. For these reasons it does not appear that defendant's counterclaim was appropriate for disposition by summary judgment.

DONALD B. DEAL v. BOYCE IRWIN CHRISTENBURY AND MARLENE W. DIXON CHRISTENBURY

No. 8026SC494

(Filed 17 February 1981)

1. Bills and Notes § 4; Mortgages and Deeds of Trust § 4.1— consideration for note and deed of trust

There was sufficient consideration for defendant wife's execution of a note and deed of trust to plaintiff where the evidence showed that, pursuant to the settlement of an action by plaintiff against defendant husband to recover an amount due under an agreement dissolving a business partnership, defendants executed the note and deed of trust to plaintiff in exchange for plaintiff's voluntary dismissal of the action and property of the partnership in which defendant wife had no interest was transferred by the partnership into the name of defendant husband and defendant wife, since (1) plaintiff's forbearance from pursuing

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his original action against defendant husband was a detriment to him sufficient to constitute consideration for execution of the note and deed of trust by both defendant husband and defendant wife, and (2) the conveyance to defendant wife of property in which she admittedly had no interest constituted adequate consideration for her execution of the note and deed of trust to plaintiff.

2. Mortgages and Deeds of Trust § 32.1— deficiency judgment after foreclosure — purchase money nature of instruments not shown on face

G.S. 45-21.38 did not prohibit plaintiff from recovering a deficiency judgment after foreclosure of a deed of trust where the note and deed of trust contained on their face no showing that they were for the balance of purchase money for real estate and the instruments were prepared by the attorney for defendants.

APPEAL by defendants from *Kirby, Judge*. Judgment entered 4 January 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 November 1980.

Plaintiff filed a complaint against defendants on 7 October 1977 seeking to recover the sum of \$14,034.90 plus interest allegedly due from defendants as a deficiency following foreclosure of a deed of trust. The complaint alleged the following: Plaintiff is the owner and holder of a note in the sum of \$20,362.65, signed by both defendants and payable with interest to the order of plaintiff. Defendants executed a deed of trust on certain real property as security for the note. The principal and interest were not paid when due. Plaintiff therefore exercised his right to declare the note with interest payable in full, the full amount due being \$21,380.79. The property subject to the deed of trust was then sold for the sum of \$7,925.00, of which \$579.11 was allotted to costs of sale, leaving a balance of \$7,345.89 to be credited as payment on the note. Defendants have failed and refused to pay the balance of the indebtedness, and the sum of \$14,034.90 thus remains due and owing.

In their answer defendants asserted as a defense that the debt of \$20,362.65 represented the balance of the purchase price for plaintiff's interest in a business partnership between plaintiff and defendant Boyce Irwin Christenbury [hereinafter "defendant-husband"] known as Chris Electric Company, and that the note and deed of trust were given in full satisfaction of the obligation of defendant-husband to plaintiff. The answer did not allege a subsequently asserted defense of want of consideration as to the defendant Marlene W. Dixon Christenbury [hereinafter "defendant-wife"].

Plaintiff's evidence tended to show the following: Plaintiff and

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defendant-husband entered a business partnership in 1966. Plaintiff's interest was 40%, and defendant-husband's was 60%. The partnership was dissolved due to conflicts between the partners on 1 January 1975, whereupon plaintiff sold his interest to defendant-husband for the sum of \$28,200.00. Defendant-husband agreed to pay plaintiff \$8,334.00 in cash, and he made this payment on 4 January 1975. He further agreed to pay \$9,933.00 on 1 June 1975 and \$9,933.00 on 31 December 1975. Plaintiff did not receive either of the \$9,933.00 payments, and as a consequence he filed a civil action against defendant-husband to recover the balance due under the agreement. This action was settled, and plaintiff entered a voluntary dismissal.

As part of the settlement of this action both defendants executed a note to plaintiff in the sum of \$20,362.65 (the balance due plus interest), secured by a deed of trust on property owned by both defendants. At least one of the three lots subject to this deed of trust was transferred from the partnership to the defendants simultaneously with execution by defendants of the note and deed of trust to plaintiff. Plaintiff introduced as part of his evidence a photocopy of the deed transferring this lot from the partnership to defendants. Defendant-wife "did not own any part of the partnership" and did not "pay anything" to the partnership for the conveyance of this lot from the partnership to defendant-husband and her.

Defendants failed to make payments on the note. Plaintiff thus foreclosed on the deed of trust. The foreclosure sale brought a net price of \$7,345.89, leaving a balance due from defendants to plaintiff of \$14,034.90.

Defendants' evidence confirmed that plaintiff and defendant-husband had been business partners and that defendant-wife "did not have any interest in the business . . . [and] didn't own anything or owe the company anything." It also confirmed that the note executed by defendants to plaintiff accurately represented the amount "remaining due and owing from [defendant-husband] to [plaintiff] in the original purchase and sale agreement;" and that partnership property had been transferred to defendants husband *and wife* as part of the settlement agreement in plaintiff's original action against defendant-husband. With regard to the transfer of partnership property to defendants, defendant-husband testified:

The property . . . was a piece of property in the name of

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myself and [plaintiff] as Chris Electric. At the time the property was bought we were partners. The partnership money went to buy that property. My wife had no interest in it. And when the note and deed of trust were executed on July 1, 1976, the deed actually transferred that partnership property to myself *and my wife*.

... This land was part of what the partnership owned at that time.

... And the property was put in my name *and my wife's name*.

....

Lot number seven which is described on this deed from the partnership to myself *and my wife* was the first lot on Rozzell's Ferry Road that we used in the business. Two more lots were purchased at a later time. Those were put in my name *and my wife's* [a]lthough they were bought out of partnership funds. [Emphasis supplied.]

John McRae, the attorney who represented defendant-husband in the original action against him by plaintiff, testified regarding this property:

The property was in the name of the partnership, Chris Electric Company, the deed was made to put it over into [the names of defendant-husband *and defendant-wife*] because [defendant-husband] said that their agreement when he bought [plaintiff] out, that this property had belonged to the partnership and was supposed to be in the settlement in the purchase of the partnership interest of [plaintiff]. [Emphasis supplied.]

Defendant-wife testified regarding this property:

As far as I know the first interest I had in any property belonging to the partnership was when the deed was transferred to me on the date the note and deed of trust [were] signed.

Defendants' evidence materially differed from plaintiff's only in that it tended to support the allegations in their answer that they understood the note and deed of trust to have been given in full satisfaction of defendant-husband's obligation. Defendant-husband testified:

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The only place that I differ with [plaintiff] is that I say that the understanding which I had was that even though I was giving him a note for that amount and the deed of trust on the three lots out there that I was to have six months in which to attempt to sell the land myself and at the end of that time if I hadn't sold it and hadn't paid him that he would agree to just take the lots and that was it.

...[I]f I could not sell the lots I would turn them over to him . . . because the property was worth more than twenty thousand dollars. In other words, I was going to take six months to try to sell the property so I could get some money out of it And if the . . . property didn't bring that value, then [plaintiff] was to take the loss and not me. Under this agreement if there was a profit I made it and if there was a loss he took the loss.

John McRae testified:

[Defendant-husband] told me that his understanding with [plaintiff] was that if he didn't get the property sold then he would just deed the property to [plaintiff] in satisfaction of this debt [He] told me he thought the property was worth in the neighborhood of twenty-four to twenty-five thousand dollars and he wanted six months to sell it and pay [plaintiff] off.

Defendant-wife testified:

Mr. McRae told us that we had six months to sell the land or [plaintiff] would get it, and that would be the end of it. I told Mr. McRae at the time that was the only way that I would sign so that that would be the absolute end of it Before I signed, I said, "Now, you are sure this is going to be the end of it." Mr. McRae said, "Yes, ma'am." I said, "That's the only way I'll sign it." He said, "Yes, ma'am. This will be the end of it."

The trial court denied defendants' motion to dismiss, both at the end of plaintiff's evidence and at the end of all the evidence. One issue was submitted to and answered by the jury as follows:

What amount, if any, is the plaintiff entitled to recover of the Defendants?

ANSWER: 14,034.90

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From a judgment entered on the verdict, defendants appeal.

Harkey, Faggart, Coira, Fletcher and Lambeth, by Charles F. Coira, Jr., for plaintiff appellee.

Roberts and Planer, P.A., by Joseph B. Roberts, III, and Childers and Fowler, by Max L. Childers, for defendants appellants.

[1] Defendants assign error to the trial court's (1) denying defendant-wife's motion to dismiss the action as to her, made on the ground that there was no evidence of any consideration for her execution of the note and deed of trust; (2) failing to "explain the law arising on the evidence given in the case" as required by G.S. 1A-1, Rule 51, by not instructing the jury on defendant-wife's defense of lack of consideration; (3) failing to submit all the issues arising on the evidence as required by G.S. 1A-1, Rule 49, in that it failed to submit as an issue the defense of lack of consideration as to defendant-wife; and (4) peremptorily instructing the jury that the only issue was whether a deficiency was owed by defendants to plaintiff, thereby precluding jury consideration of the issue of whether defendant-wife had a valid defense of lack of consideration. The sole question presented by these assignments of error, then, is whether from the evidence adduced at trial the jury could have found absence of consideration for execution of the note and deed of trust by defendant-wife.

We note at the outset that failure of consideration is an affirmative defense which must be pleaded in responding to a preceding pleading. G.S. 1A-1, Rule 8(c). The answer filed by defendants contains no pleading of this defense. Defendants nevertheless contend that the record contains evidence "relating to the defense," and that the issue thus should be treated as though it "had been raised in the pleadings" pursuant to Rule 15(b). We find no basis in the evidence for a defense of lack of consideration as to defendant-wife, and we thus uphold the trial court's decisions to which error is assigned.

In *Investment Properties v. Norburn*, 281 N.C. 191, 195-196, 188 S.E.2d 342, 345 (1972), our Supreme Court, speaking through Justice Moore, stated the following:

It is well-settled law in this State that in order for a contract to be enforceable it must be supported by consideration . . . As

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a general rule, consideration consists of some benefit or advantage to the promisor or some loss or detriment to the promisee

....

It is not necessary that the promisor receive consideration or something of value *himself* in order to provide the legal consideration sufficient to support a contract. Forbearance to exercise legal rights is sufficient consideration for a promise given to secure such forbearance *even though the forbearance is for a third person rather than that of the promisor*.

Investment Properties, 281 N.C. at 195-196, 188 S.E.2d at 345 (emphasis supplied). See also *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E.2d 629 (1949). Here, all of the evidence is to the effect that the note and deed of trust from defendants to plaintiff were executed as part of the settlement of the original action by plaintiff against defendant-husband for the purpose of inducing plaintiff to enter a voluntary dismissal in that action. Plaintiff testified in this respect:

[T]here was a settlement of the suit and we took a dismissal through my attorney of the action against [defendant-husband] *in exchange for a note and deed of trust*. The note and deed of trust *which [were] given to me in settlement of the lawsuit . . . was a note in the amount of \$20,362.65.... As part of the transaction I also received a deed of trust on certain property belonging to [defendants].* [Emphasis supplied.]

Defendants' evidence in no way denied plaintiff's testimony that the note and deed of trust were given in exchange for plaintiff's entering a voluntary dismissal in his action against defendant-husband. Defendants merely asserted an alleged understanding on their part that in the event of their failure to pay sums due under the note, plaintiff would take the property subject to the deed of trust in full satisfaction of the obligation.

Plaintiff's forbearance in not pursuing his original action against defendant-husband was clearly a "detriment" to him sufficient to constitute consideration for defendant-husband's execution of the note and deed of trust. Because "[f]orbearance to exercise legal rights is sufficient consideration . . . even though the forbearance is for a third person rather than . . . the promisor," *Investment Properties*, 281 N.C. at 196, 188 S.E.2d at 345, it was also sufficient to constitute consideration for their execution by defendant-wife.

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Further, all the evidence shows that, as a part of the transaction in which plaintiff's original action against defendant-husband was dismissed in exchange for the note and deed of trust from both defendants, property of the partnership *in which the wife had no interest* was transferred by the partnership into the names of defendant-husband *and defendant-wife*. In this regard, the plaintiff testified, after identifying the deed conveying this property, "That was part of the transaction under which I took the note and deed of trust and conveyed that property from Chris Electric to the [defendants] alone." Defendant-husband testified:

My wife . . . did not have any interest in the business. She didn't own anything or owe the company anything. Exhibit "D" is the note and deed of trust that we signed . . . Exhibit "E" [the deed conveying partnership property to defendants] *was signed at the same time*. That was done so that there would be a deed of trust on the three lots . . . where they would all be in one name. That was done so we could carry out this transaction I referred to. [Emphasis supplied.]

He further testified:

The property described in Exhibit "E" and signed by me was a piece of property in the name of myself and [plaintiff] as Chris Electric. At the time the property was bought we were partners. The partnership money went to buy that property. My wife had no interest in it. *And when the note and deed of trust were executed on July 1, 1976, the deed actually transferred that partnership property to myself and my wife*. [Emphasis supplied.]

John McRae, the attorney who represented defendant-husband in the original action against him by plaintiff, testified: "The agreement we worked out was to give [defendant-husband] six more months to sell the property and pay [plaintiff] off. Based upon that Mr. Coira [plaintiff's attorney] *dismissed this lawsuit on the contract and they executed this deed and [defendants] executed this deed of trust*." [Emphasis supplied.] Defendant-wife testified:

When these papers were signed, the note and deed of trust *and deed*, my husband and I both talked with Mr. McRae at that time.

... *At the time the note and deed of trust [were] signed by*

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myself and my husband *I signed the deed* conveying lot seven from the name of the partnership *into my name* and my husband's name.

I did not have any interest in the partnership . . . As far as I know the first interest I had in any property belonging to the partnership was when the deed was transferred to me *on the date the note and deed of trust [were] signed*. [Emphasis supplied.]

In addition to this testimony the exhibits which are part of the record indicate that the deed conveying partnership property to defendants, and the note and deed of trust from defendants to plaintiff, bore the identical date of 1 July 1976. The exhibits further indicate that the deed was recorded in the Office of the Register of Deeds for Mecklenburg County on 30 August 1976, and that the deed of trust was recorded on the same date one minute later.

It is thus clear, from the testimony of the parties and from the exhibits, that the conveyance by the partnership to defendants of partnership property in which defendant-wife had no interest, and the execution of the note and deed of trust from defendants to plaintiff, were part of the same transaction in settlement of the original action by plaintiff against defendant-husband. We find that the conveyance to defendant-wife of property in which she admittedly had no interest constituted adequate consideration for her execution of the note and deed of trust to plaintiff. This conveyance to defendant-wife of property in which she had no interest was something plaintiff was in no way bound to do; and "there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do . . ." *Stonestreet v. Oil Co.*, 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946).

In *Casualty Co. v. Funderburg*, 264 N.C. 131, 140 S.E.2d 750 (1965), defendants, husband and wife, executed an indemnity contract agreeing to indemnify plaintiff against loss by reason of its suretyship on bonds executed for defendants or either of them. Plaintiff was surety on a performance and payment bond on which defendant-husband alone was principal. It sustained a loss by reason of execution on the bond, and brought an action against both defendants to recover the loss pursuant to the indemnity agreement. The trial court found that the indemnity contract lacked consideration as to defendant-wife and dismissed the action as to her. The Supreme Court reversed, stating: "Where . . . parties make

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reciprocal promises and one of the parties fulfills his promise, the law will not permit the other promisor to avoid his obligation on the assertion that he received no consideration." *Casualty Co.*, 264 N.C. at 134, 140 S.E.2d at 752.

Here, the undisputed facts indicate that plaintiff fulfilled his promises by (1) dismissing his original action against defendant-husband and (2) joining in the conveyance to both defendants of partnership property in which defendant-wife had no prior interest. He was not required to do either, but did both in the fulfillment of his obligation incurred pursuant to reciprocal promises made for the purpose of settling a legal action which he had a right to bring and maintain. The plaintiff having fully performed his promises, defendant-wife cannot now be permitted to avoid her obligation "on the assertion that [s]he received no consideration." *Casualty Co.*, 264 N.C. at 134, 140 S.E.2d at 752.

We hold that, considering the evidence in the light most favorable to defendants, there was no genuine issue for jury determination on the question of want of consideration as to defendant-wife, and that the trial court's acts or omissions regarding this issue to which defendants assign error thus were proper.

[2] Defendants contend in the alternative, by a single sentence in their brief, that "if the consideration for execution of this note and deed of trust was the conveyance of realty to [defendant-wife] by the partnership then NCGS § 45-21.38 would be applicable, and the plaintiff would not be in a position to bring this suit against her." They apparently attempt to assert by this sentence that the plaintiff was in the position of a seller of real estate in the settlement transaction by which the lot was conveyed by the partnership to defendants; that defendants were in the position of purchasers in the transaction; and that the deed of trust thus was, in effect, given "to secure to the seller the payment of the balance of the purchase price of real property." If that were true, G.S. 45-21.38 would provide that plaintiff "shall not be entitled to a deficiency judgment on account of such . . . deed of trust."

Assuming, *arguendo* only, that the net effect of the transaction was as defendants by this argument contend, the record nevertheless establishes that there was no genuine issue for jury determination in this regard. G.S. 45-21.38 disentitles the creditor to a deficiency judgment only if the "evidence of indebtedness shows upon

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the face that it is for the balance of purchase money for real estate." The only exception to this requirement is that if the "note or notes are prepared under the direction and supervision of the seller," any loss for failure to comply shall fall on the seller. G.S. 45-21.38.

Here, the note and deed of trust contain on their face no showing that they are for the balance of purchase money for real estate. Neither the record proper nor the exhibits indicate the preparer of the note; but the exhibits reveal that the deed of trust was prepared by John A. McRae, Jr., who is identified throughout the record as attorney for *defendants*.¹ Nothing in the record indicates that McRae at any time represented either the partnership or the plaintiff. Thus the failure of the "evidence of indebtedness" to reflect on its face "that it is for balance of purchase money for real estate" cannot be attributed to the "seller" (plaintiff) on the basis that it was "prepared under the direction and supervision of the seller." Because the only basis for exemption from the requirement that the evidence of indebtedness show on its face that it is for the balance of purchase money for real estate is not present here, defendants' failure to establish compliance with the requirement is necessarily fatal to the defense for which they contend.

Because we find no genuine issue for jury determination on the question of want of consideration as to defendant-wife, and because the failure of the note and deed of trust to reflect on their face that they are "for balance of purchase money for real estate" negates any bar to a deficiency judgment which, *arguendo*, might otherwise be raised by G.S. 45-21.38, we find no error in the trial of the case.

No error.

Judges HEDRICK and CLARK concur.

¹ *E.g.*, McRae testified: "I know [defendant-husband]. I had an occasion to represent him in a case . . . which has been introduced as Exhibit 'B' [the original action by plaintiff against defendant-husband]." (Emphasis supplied.)

Defendant-wife testified: "When I signed the note and deed of trust there was a discussion with Mr. McRae about what the agreement was. Yes sir, I remember signing the note and deed of trust. I had been sued and we were settling it. *Mr. McRae was representing me.*" (Emphasis supplied.)

Midrex Corp. v. Lynch, Sec. of Revenue

MIDREX CORPORATION v. MARK G. LYNCH, SECRETARY OF THE NORTH
CAROLINA DEPARTMENT OF REVENUE

No. 8026SC616

(Filed 17 February 1981)

Taxation § 32— tax on intangibles — customer advances are not accounts payable

Customer advances on construction contracts are not "accounts payable" which are deductible under the intangible tax statute, G.S. 105-201.

APPEAL by plaintiff from *Ferrell, Judge*. Judgment signed 24 March 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 January 1981.

Plaintiff is a Delaware corporation with its principal place of business in Charlotte, North Carolina. It constructs iron processing plants, utilizing a patented process for the direct reduction of iron from ore. In 1974 and 1975 it entered into three contracts to construct such plants for foreign customers. Under the terms of the contracts, each customer was required to make an advance deposit of a part of the contract price before plaintiff began its performance of the contracts. Plaintiff used these funds to finance its construction of the plants. The advances amounted to \$8,391,700 on 31 December 1975.

In filing its intangible tax return for the taxable year 1975, plaintiff listed those advances as accounts payable and deducted them from its listed accounts receivable in determining its total tax due. The revenue department disallowed the deduction, and assessed an additional tax of \$14,497.85 plus interest against plaintiff, which it paid under protest. Plaintiff made a timely request for refund of the additional tax and interest. The refund was denied and plaintiff brought this action to determine the validity of the assessment.

In the superior court, both parties moved for summary judgment, and after hearing, the court entered summary judgment for defendant. Plaintiff appeals.

Moore and Van Allen, by Daniel G. Clodfelter, for plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General

Midrex Corp. v. Lynch, Sec. of Revenue

Marilyn R. Rich, for defendant appellee.

MARTIN (Harry C.), Judge.

The resolution of this appeal turns upon the meaning of the phrase "accounts payable" as it appears in N.C.G.S. 105-201. The relevant portions of the statute are:

Accounts receivable. — All accounts receivable on December 31 of each year . . . shall be subject to an annual tax . . . Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer as of the valuation date of the accounts receivable . . .

The term "accounts payable" as used in this section shall not include:

- (1) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;
- (2) Taxes of any kind owing by the taxpayer;
- (3) Debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or
- (4) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

....

The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within 120 days prior to the date as of which the intangible tax return is made.

This appears to be a question of first impression in North

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Carolina. It has been well briefed and ably argued by counsel. Plaintiff contends we should adopt a broad meaning of the term "accounts payable," and find that it includes any obligation, unless expressly eliminated by the statute itself, due from one person to another, whether money, goods, or services. Plaintiff argues that is the interpretation given to the term in accounting practice and introduced expert evidence supporting this approach. Plaintiff further suggests that to do otherwise would result in an unconstitutional application of the taxing statute.

Defendant would have us hold to a more traditional, narrower meaning of the disputed phrase. He urges that the statute, and administrative interpretations of it, support a finding that customer advances under contracts are not accounts payable to the payee. The secretary further states that statutory tax terms are not limited to the meaning given them by the expert practitioners in the field, and sees no constitutional defects in denying the deduction as to plaintiff's intangible tax return.

It is, of course, familiar learning that in resolving statutory construction problems, the aim is to discern the intent of the legislature. This rule applies to tax cases. *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E.2d 297 (1976).

Where the meaning of a tax statute is doubtful, it is construed against the State and in favor of the taxpayer unless a contrary legislative intent appears "In the interpretation of the statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould*, 245 U.S. 151, 62 L.Ed. 211, 38 S.Ct. 53 (1917). Conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is strictly construed against the taxpayer and in favor of the State

In the absence of a clear indication to the contrary, words in a statute must be given their ordinary meaning unless they have acquired a technical significance If the statute itself contains a definition of a word used

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therein, that definition controls and courts must construe the statute as if the definition had been used in lieu of the word. If the words of the definition itself are ambiguous, they must be construed pursuant to the general rules of statutory construction.

Id. at 135-36, 221 S.E.2d at 304-05 (citations omitted).

The article on intangible taxes does not contain a definition of "accounts payable," although the statute lists several things that are not included within the term. Therefore, the words must be given their ordinary meaning unless the statute contains a clear indication to the contrary, or the words have acquired a technical significance. *See Food House, supra*. We find nothing in the statute to indicate that the ordinary meaning of the term should not be used, or that the term has acquired any technical significance beyond that of its ordinary meaning, which is to say that the ordinary meaning of the term has technical significance to some extent.

This is a tax levying article. As such it must be construed in favor of the taxpayer and against the state. *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E.2d 199 (1974). Where the statutory scheme provides an exemption from the tax, it must be construed against the taxpayer. *Id.* Here, the statute allows a deduction of accounts payable. A deduction is "something that is or may be subtracted." *Ward v. Clayton, Com'r of Revenue*, 5 N.C. App. 53, 167 S.E.2d 808 (1969), *aff'd*, 276 N.C. 411, 172 S.E.2d 531 (1970). "Deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace. A taxpayer claiming a deduction must bring himself within the statutory provisions authorizing the deduction. 85 C.J.S., Taxation § 1099." *Id.* at 58, 167 S.E.2d at 811. We hold the phrase in question is a part of the statute establishing a deduction and that plaintiff has the burden of bringing his claim within the meaning of the deduction.

The accounting literature does not always agree on how an item should be handled in a balance sheet presentation. W. Meigs and C. Johnson, *Accounting, The Basis For Business Decisions* (1962), at 11, defines accounts payable as "the liability arising from the purchase of goods or services on credit." *See also* W. Pyle & J. White, *Fundamental Accounting Principles* (7th ed. 1975). Customer advances are given special treatment in accounting literature

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and are distinguishable from accounts payable. "*Accounts payable* are the various amounts of money owed by the corporation to those with whom it does business Other current liabilities include primarily accrued expenses such as salaries and wages Also dividends payable, customer advances, and the like." B. Graham and C. McGolrick, *The Interpretation of Financial Statements* 11 (3d rev. ed. 1975) (emphasis in original). In E. Faris, Jr., *Accounting for Lawyers* (3d ed. 1975), at 65, in distinguishing prepaid insurance premiums from other advance payments, we find:

Other types of advance payments (such as the prepayment of rent) must for tax purposes also be allocated as expenses over the period of years to which the prepayment applies.

....

The "revenue matching" principle of good accounting requires that advance receipts of income be allocated as revenues to the several years in which goods or services will be rendered in satisfaction of the advance receipt.

....

In one broad sense the Advance Rentals Credit represents a type of liability. There is not a liability to pay money, but there is a liability to the subtenant to permit him to use a part of the premises In a more technical sense, the credit is an unearned income to be recognized as a current income as earned.

Thus it appears that customer advances, such as received by plaintiff, are in reality unearned income. They are received by the requirements of contract in advance of performance. Plaintiff has no duty to repay the customer the amounts received; it only has a contractual obligation to construct the plant according to the terms of the contract. The duty to perform is imposed on plaintiff by reason of its contract, not because of the receipt of the customer advance. The customer advance is simply part performance by the purchaser of its contractual obligation to pay the purchase price. How plaintiff may choose to identify, describe, or carry the customer advances for its own bookkeeping purposes does not change their true nature. Nor can it control the tax liability of plaintiff. The statute itself must control in determining the levying and collection

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of the tax. See *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 231 S.E.2d 656 (1977). The Court in *Realty Corp.*, speaking of franchise taxes, stated:

G.S. 105-122 does not authorize either the deduction of deferred income taxes from the franchise tax base or the use of generally accepted accounting principles to compute the tax. That portion of the statute which states that the tax shall be computed from the "books and records of the corporation" is not a requirement that the Commissioner follow the categorizations placed upon the information contained in the books and records. Rather, the statute authorizes the Commissioner to require such facts and information as is deemed necessary to comply with his duty to assess the franchise tax in accordance with the statute.

Id. at 615, 231 S.E.2d at 661.

The administrative interpretation of a tax statute may be considered by the court in its construction of the statute. *Yacht Co. v. High, Commissioner of Revenue*, 265 N.C. 653, 144 S.E.2d 821 (1965). If customer advances are accounts payable by plaintiff, then they must be accounts receivable by the party making the advance. The Department of Revenue has declined to tax customer advances as accounts receivable by the party making the advance. The Intangible Personal Property Tax Bulletin (1975), portions being introduced as evidence in this case, contains a list of items taxable as accounts receivable and deductible as accounts payable. All are items payable in money without the happening of a condition precedent.

The bulletin expressly excludes as an account payable "billings in excess of costs on uncompleted contracts." The customer advances received by plaintiff come close to being billings in excess of costs on uncompleted contracts. They are paid pursuant to uncompleted contracts, and, when received, are in excess of costs expended by plaintiff, as it has not incurred any costs with respect to the contract at that time. This administrative ruling is a close analogy to the nature of customer advances and a potent argument to disallow them as deductions for intangible tax purposes.

Although we find no North Carolina decisions on point, two cases from the state of Ohio are pertinent. In *Black-Clawson Co. v.*

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Evatt, 139 Ohio St. 100, 38 N.E.2d 403 (1941), the court construed section 5327 of the Ohio General Code. In determining the tax due under that section, taxpayers were allowed a deduction of accounts payable from the tax base. Plaintiff had received customer advances on contracts for the manufacture of machinery and sought to deduct them as accounts payable. The Ohio court disallowed the deduction, stating:

If there is any liability on the part of the seller to the buyer, it is assuredly contingent. Yet we must ever hark back to the reality that there is no liability until the contingency arises. That contingency is the breach of the sale contract by the seller and the resulting liability is founded not on an account but on the breach Obviously there is no subsisting liability until the breach occurs, for normally the seller's contractual obligation is to be discharged by the delivery of the finished product and not by cash. Even though the payment be set up on the books of the seller as an account, there would be nothing payable on it, as such, at any time.

After all the test is not what is good accounting practice but what is the meaning and intent of the taxational provision

What, then, is the correct interpretation? What is the plain meaning of the statute when viewed in the light of the object to be accomplished? . . . Certain it is that if the advance payments be accounts payable, as claimed by the appellant, they are payable to the buyer and must be listed in the buyer's return as accounts receivable. The result would be that the buyer would be listing the part of the price paid as owing to and receivable by him. An interpretation which leads to that result would be an anomaly. When the language of the statute is considered in its fullness and at the same time in its plain meaning, it admits of but one interpretation. The advance payments cannot be listed as accounts payable and deducted from the sum of accounts receivable and prepaid items in determining credits.

Id. at 105, 38 N.E.2d at 405-06.

Likewise, in *Wright Co. v. Glander*, 151 Ohio St. 29, 84 N.E.2d

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483 (1949), customer advances paid by the United States Government to plaintiff were not allowed to be deducted as accounts payable, even though a contract provision allowed the government to demand repayment of the advance without showing a breach of contract by plaintiff. The court stated:

The advance payments were not a loan within the contemplation of the parties [W]hat the government wanted and required was not a return of the advance payments but aeronautical engines

There can be no question that the unliquidated advance payments were current liabilities of Wright, but that does not mean they were current accounts payable.

Id. at 47, 84 N.E.2d at 491-92.

Appellant further argues that the taxing statute in question, while not unconstitutional on its face, is unconstitutional when applied to plaintiff under the facts of this case. Plaintiff makes this argument for the first time in this Court upon appeal. The record does not contain anything in the pleadings, evidence, judgment or otherwise, to indicate that any constitutional argument was presented to the trial court. The appellate court will not decide a constitutional question which was not raised or considered in the trial court. *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E.2d 435 (1971); *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E.2d 328, *cert. denied*, 298 N.C. 294 (1979). The record must affirmatively show that the question was raised and passed upon in the trial court. *See City of Durham v. Manson*, 285 N.C. 741, 208 S.E.2d 662 (1974); *Boehm, supra*. This is in accord with the decisions of the United States Supreme Court. *Edelman v. California*, 344 U.S. 357, 97 L. Ed. 387 (1953). Appellant, who has the duty to do so, has failed to demonstrate by the record that any constitutional question was before the trial court. In any event, we decide this case by statutory construction and would not reach any constitutional question if properly presented. *State v. Lueders*, 214 N.C. 558, 200 S.E. 22 (1938); *State v. Wallace*, 49 N.C. App. 475, 271 S.E.2d 760 (1980). We reject the argument.

We hold plaintiff is not entitled to deduct the customer advances received pursuant to its construction contracts as accounts payable under the intangible tax statute, N.C.G.S. 105-201. The entry of summary judgment in favor of defendant was proper, and it is

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Affirmed.

Judges WEBB and WHICHARD concur.

T. W. BROWN v. BRUCE L. SCISM

No. 8022SC558

(Filed 17 February 1981)

1. Contracts § 27.2— grading contract — no ambiguity

In an action for breach of a contract for grading to be performed on a new segment of a highway, the trial court correctly ruled and instructed the jury that the contract in question was not ambiguous where the contract, prepared by plaintiff, clearly provided that all dirt which would be needed to fill low areas could be found within the area designated in the contract, and defendant was not required to go outside the boundaries of the project in order to fulfill his agreement under the contract.

2. Trial § 10.1— no expression of opinion by trial court

In an action for breach of contract there was no merit to plaintiff's contention that the trial court erred in commenting during trial on its interpretation of the contract, since the court, in questioning a witness in order to clarify his answer, did not err in indicating that an area referred to by the witness was not within that designated by the terms of the grading contract and the court, in addition, instructed the jury to disregard his exchange with the witness and the lawyers; nor did the court err in submitting to the jury a diagram of the contract along with an oral explanation of its meaning, since the court, in grammatically diagraming the contract, merely simplified the contract, reducing it to its basic elements, and the court's use of the illustration was not suggestive or likely to confuse the jury.

3. Contracts § 27.2— grading contract — no breach

Evidence was sufficient to support the jury's finding that there was no breach of a grading contract where it tended to show that defendant agreed to complete grading work between two railroads; the contract provided that all the dirt necessary to fill low areas could be found between the two railroads; there was in fact insufficient dirt to fill the low areas; and defendant was therefore justified in leaving the job before the grading was completed.

4. Contracts § 29.5— funds withheld from grading contractor — award of interest proper

In an action to recover for breach of a grading contract where the jury found that there was no breach and the amount of money retained by plaintiff was due defendant under the contract, the trial court properly allowed defendant interest from the date he was entitled to the money held by plaintiff.

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APPEAL by plaintiff from *Hairston, Judge*. Judgment filed 8 February 1980 in Superior Court, DAVIE County. Heard in the Court of Appeals 7 January 1981

This action is based on a contract for grading to be performed on a new segment of Interstate 85 in Davidson County, North Carolina. D. R. Allen & Sons, Inc. was the primary contractor for the portion of the highway running from Southern Railway to Abbotts Creek. Allen subcontracted the grading work on the project to T. W. ("Dock") Brown, plaintiff herein. Brown further subcontracted a smaller portion of the grading work, for the segment running from Southern Railway to Winston-Salem Southbound Railroad, to defendant, Bruce L. Scism. The entire project involved approximately three and one-half miles, of which approximately two and one-eighth miles were subcontracted to Scism. Brown and Scism entered into the following contract:

January 8, 1976

This is a contract between T. W. Brown and Bruce Sisim
[sic]:

Furnish all labor, materials, and equipment necessary to accomplish the following items in strict accordance with the plans and specifications as prepared by the North Carolina State Highway Commission's standard specifications for roads and structures, and in particular Division II, for the unit prices listed herewith:

The yardage in this contract is between Winston South Bound Railroad and Southern Railway containing approximately one million cubic yards.

Unit cost	\$0.50	Unclassified excavation, Section No. 225
	1.15	Undercut excavation, Section No. 225
	0.75	Benching excavation for em- bankment, Section No. 234
	0.75	Berm ditch construction, Section No. 240

Payment will be made monthly on 90% of the completed work approved quantities of the Department of Transportation personnel less payroll submitted by you to us and

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approved by us, plus 16% of the total amount of your payroll. 16% will include:

5.85% FICA	1% General Liability
3.5% FUI and NCUI	Insurance
4.5% Workmen's Compensation	1.5% Overhead and Office

Payment for Rock Excavation will be deducted on quantities agreed on by T. W. Brown's representative and D. R. Allen & Son's Representative.

You will be required to carry three (3) trainees on this project.

T. W. Brown
By: s/ T. W. Brown

Bruce Sisim
By: s/ Bruce L. Scism
Bruce Sisim

The record tends to show that shortly after the contract was executed, Scism moved equipment onto the project and commenced grading under supervision of Brown's superintendent. It later became apparent that there was insufficient dirt between the railroads to fill in the low areas of the highway. A dispute arose as to whether Scism was required under the contract to obtain the dirt necessary for filling low portions from outside the area designated in the contract.

Scism testified he was paid \$31,322.98 by a check dated 27 August 1976 and Brown later stopped payment on that check. On 3 September 1976, Brown replaced the check with two checks, one of which was made out to Scism and Carolina Tractor. Carolina Tractor was paid from this check.

Scism left the project in early September 1976. Brown finished the grading work and retained \$62,363.58 of funds owed to Scism for work he had completed. Brown sued for breach of contract and Scism counterclaimed, seeking recovery of the retainage.

Upon trial, the jury found that Scism did not breach the contract as alleged, and judgment was entered ordering that Scism recover the retainage with interest from 17 November 1976. From

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this judgment, Brown appeals.

Smith and Michael, by R. B. Smith, Jr. and Phyllis S. Penry, and Martin and Van Hoy, by Henry T. Van Hoy II and D. Duncan Maysilles, for plaintiff appellant.

Guller and Bridges, by Jeffery M. Guller, and Lamb and Bridges, by Forrest Donald Bridges, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] The dispute between the parties in this case is whether defendant Scism was required to move dirt onto his portion of the project from outside its boundaries in order to fulfill his agreement under the contract. Defendant contends that he fully complied with the contract by moving all the yardage that could be moved within the boundaries of the contract. Plaintiff asserts in his brief that under the agreement defendant was required to complete all the grading work, which entailed three major operations:

(1) removing dirt to cut the high areas or “cuts” down to the correct grade for the highway (dirt removed from these areas is referred to as “excavation”); (2) placing dirt in the low areas and compacting it to bring these “fill” areas up to highway grade; (3) fine grading the entire project, bringing the area to within [*sic*] one-tenth of a foot of the highway grade as shown on the plans.

Plaintiff contends that defendant’s failure to complete the job constitutes a breach of the contract.

Plaintiff’s major contention in this appeal is that the trial court erred in ruling that the contract in question is not ambiguous, and in instructing the jury to that effect. By introducing evidence to define terms relating to highway construction and excavation, plaintiff sought to establish that the parties intended that defendant complete all the grading work for the portion of the project between Southern Railway to Winston-Salem Southbound Railroad, regardless of the source of fill. Defendant did not contradict plaintiff’s definitions in accordance with their usage in the trade, nor did he deny that he left the project after performing what work he could that was within the boundaries delineated in the contract. Rather, defendant relied on the express language of the contract which stated: “The yardage in this contract is between Winston

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South Bound Railroad and Southern Railway containing approximately one million cubic yards.”

It is well established that where a contract is unambiguous its interpretation is a matter of law for the court, which must interpret the instrument as it is written. *See, e.g., Root v. Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968); *Brinkley & Associates v. Insurance Corp.*, 35 N.C. App. 771, 242 S.E.2d 528 (1978). The express language contained in the contract, not what either party interprets the agreement to be, controls in the determination of its meaning. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E.2d 580 (1976); *Nash v. Yount*, 35 N.C. App. 661, 242 S.E.2d 398, *disc. rev. denied*, 295 N.C. 91 (1978).

Plaintiff argues that technical words are to be interpreted as they are usually understood by experts in the profession or business, unless the context clearly indicates otherwise, citing 17 Am. Jur. 2d Contracts § 251 (1964). We agree with plaintiff that words such as unclassified excavation, undercut excavation, benching, and berm ditch have technical definitions indigenous to the grading business. Testimony as to the meaning of these and other terms was properly admitted into evidence without objection or contradiction by defendant. While these definitions apply to the type of work defendant was to perform under the contract, they do not, as plaintiff insists, render the contract ambiguous. Nor do they leave a question as to whether the yardage between the railroads included all the cuts required to be made, or whether the million yards between the railroads made reference to the necessary amount of fill, irrespective of whether the material was to be found within or without the area bounded by the tracks.

Defendant was to be paid according to number of cubic yards of dirt he moved. Plaintiff's witness Gilbert Church testified:

In figuring the amount of money that was to be paid to Mr. Scism, I took the cubic yards that the State paid for dirt moved where he was working and multiplied fifty cents a yard times that. The fifty cent figure is the contract price he agreed to move it for.

It is apparent that when the contract was negotiated and drawn up, the number of cubic yards of dirt available for use as fill within the designated area was miscalculated. Plaintiff himself testified:

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It was my opinion at the time of the execution of the contract between myself and Mr. Scism that there was a million yards of dirt between the two railroads. I told him that's where I wanted him to work. I told him he wouldn't have to go off the State right of way to get the material. I never discussed with him that the area between the railroads was a borrow situation.

Yet plaintiff offers another portion of his testimony as evidence that he meant defendant would be able to obtain all the necessary dirt, or yardage, from within the boundaries of the entire project, which was the subject of the subcontract between D. R. Allen and Sons, Inc. and plaintiff, to which defendant was not a party:

I told Bruce standing on the site of the job that he was to set his mind straight on the yardage. He wouldn't have to buy any dirt. All the jobs are either borrow or waste. They didn't run out even. You have to go out and borrow material. I told him he wouldn't have to go out and buy dirt anywhere, it was all on the job site. I did not tell him that the entire million yards he was to move was between the railroads. I told him he was to move a million yards, that is what it took in the fills. I told Bruce that he wouldn't have to worry about going off the complete highway project to buy any material, that this was a waste project. I told Bruce the yardage he was to move was between the railroads and that included fill and cutting. I told Mr. Scism there were approximately a million yards of dirt to move between the railroads.

This testimony is in direct contradiction to the express language of the contract. A party may not use parol evidence to create ambiguity where the terms of the contract are clear. *See Rhoades v. Rhoades*, 44 N.C. App. 43, 260 S.E.2d 151 (1979); *Hall v. Hall*, 35 N.C. App. 664, 242 S.E.2d 170, *disc. rev. denied*, 295 N.C. 260 (1978). We hold that the trial judge correctly ruled and instructed the jury that the contract in this case was not ambiguous. Additionally, the record reveals that plaintiff prepared the contract in question. Even when a contract contains ambiguities, such terms must be resolved against the party who prepared the document. *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E.2d 473 (1974); *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946). Plaintiff's

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three assignments of error relating to ambiguity are overruled.

Plaintiff assigns error to the trial court's sustaining objections to questions directed to plaintiff's witnesses. These questions related to the amount and type of work remaining and to the issue of damages plaintiff alleged to have sustained by having to complete the project after defendant left the site. An appellant must not only show error, but must demonstrate that he was prejudiced by the alleged error. *See, e.g., Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967); *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E.2d 766 (1965). Plaintiff and his other witnesses were allowed to testify as to the remaining work and its cost. Because the similar evidence was introduced without objection and because the jury found defendant had not committed a breach, plaintiff has not been prejudiced by the omission of this testimony, even if it did constitute error. The assignment of error is overruled.

[2] Plaintiff contends that the trial court erred in commenting during trial on its interpretation of the contract. He bases his exception on the following exchange:

The only place we had trucks hauling was cutting on the eastbound and hauling between the railroads.

COURT: Go on the eastbound?

A. I'm sorry, east side of the Winston-Salem Railroad.

MR. GULLER: OBJECTION as being outside of the boundaries of the contract. Motion —

COURT: Yes, sir. When you are clearly outside, you are clearly outside.

MR. SMITH: We ask that be put in the record.

COURT: It's in the record. Don't take in account the last answer of the witness, the lawyer and answers to my question trying to clarify what he was saying.

The court may question a witness in order to clarify his answer. *Andrews v. Andrews*, 243 N.C. 779, 92 S.E.2d 180 (1956); *Yelton v. Dobbins*, 6 N.C. App. 483, 170 S.E.2d 552 (1969). As the record indicates, the area referred to by the witness was not within that designated by the terms of the contract. In addition, the court instructed the jury to disregard the exchange. This assignment of

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error is overruled.

Plaintiff assigns as error the court's submission to the jury of a diagram of the contract, along with an oral explanation as to its meaning. Plaintiff contends this constitutes an introduction of evidence by the court and an impermissible comment on the evidence.

A trial judge may not convey to the jury his opinion of the facts to be proven in any case. N.C. Gen. Stat. 1A-1, Rule 51(a); *Heath v. Swift Wings, Inc.*, 40 N.C. App. 158, 252 S.E.2d 526, *disc. rev. denied, appeal dismissed*, 297 N.C. 453 (1979). But, in *Bodenheimer v. Bodenheimer*, 17 N.C. App. 434, 435, 194 S.E.2d 375, 376, *cert. denied*, 283 N.C. 392 (1973), this Court enumerated two duties required of the trial judge under Rule 51: "(1) to declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case." The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. *Sugg v. Baker*, 258 N.C. 333, 128 S.E.2d 595 (1962); *Dunlap v. Lee*, 257 N.C. 447, 126 S.E.2d 62, 96 A.L.R.2d 754 (1962).

While admittedly a novel approach, we find no error in Judge Hairston's grammatically diagramming the contract. He merely simplified the contract, reducing it to its basic elements. He correctly set out the duties of both parties to the contract, adding to or deleting no material terms from the original document. As noted above, the interpretation of an unambiguous contract is a matter of law for the court to determine. This Court has cautioned that a trial judge should carefully guard his use of illustrations to avoid suggestions susceptible of inferences as to facts beyond those intended, or which may tend to confuse the jury. *Terrell v. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971). *Accord, Rea v. Simowitz*, 226 N.C. 379, 38 S.E.2d 194 (1946). We find no such suggestiveness nor likelihood of jury confusion in these instructions, and dismiss the assignment of error.

Plaintiff assigns error to four other portions of the judge's instructions to the jury. These portions are not properly set out in the record according to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. These rules are mandatory. *Craver v. Craver*, 298 N.C. 231, 258 S.E.2d 357 (1979); *In re Allen*, 31 N.C. App. 597,

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230 S.E.2d 423 (1976). In our discretion, we have carefully reviewed the entire charge to the jury and find no prejudicial error when examined contextually as a whole. See *Nance v. Long*, 250 N.C. 96, 107 S.E.2d 926 (1959); *Colettrane v. Lamb*, 42 N.C. App. 654, 257 S.E.2d 445 (1979).

[3] Plaintiff also assigns as error the denial of his motions for directed verdict, to set aside the verdict, and for a new trial. Plaintiff contends that defendant's own evidence, taken as true, showed defendant in fact breached the contract, entitling plaintiff to a verdict in his favor, citing *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967); *Arnold v. Charles Enterprises*, 264 N.C. 92, 141 S.E.2d 14 (1965). Plaintiff would have us hold that defendant's admitted failure to complete the grading work between the two railroads unquestionably established a breach. A breach of contract has been described as an unjustified failure to perform a promise that is part of the contract. N.C.P.I.—Civil 510.10. See also Black's Law Dictionary 235 (4th ed. rev. 1968); *Sechrest v. Furniture Co.*, 264 N.C. 216, 141 S.E.2d 292 (1965). Defendant presented evidence that tends to show that he completed the work he agreed to perform under the contract or that he was justified in leaving the job before the grading was completed. The court properly instructed the jury on breach of contract, and the jury found no breach.

[4] Last, plaintiff assigns error to the court's entry of judgment and assessment of interest from 17 November 1976. Plaintiff argues that because there was no finding of breach committed by plaintiff and because plaintiff had rightfully retained the funds under the contract, the imposition of interest on the retainage is punitive in nature. We do not agree. The jury found no monies were due plaintiff from defendant. Therefore, there was no set-off to consider. The amount of the retainage was due defendant under the contract. N.C.G.S. 24-5 provides for interest on money due by contract of any kind. In *Rose v. Materials Co.*, 282 N.C. 643, 671, 194 S.E.2d 521, 540, 67 A.L.R.3d 1, 25 (1973), our Supreme Court noted that "the trend is toward allowance of interest in almost all types of cases involving breach of contract." Here, the jury did not determine the amount owed defendant. Rather, in his complaint plaintiff admitted holding defendant's funds. Plaintiff had the use and benefit of defendant's money for more than four years during the litigation of this suit. The trial judge properly allotted interest from the date defendant was entitled to those funds. The assignment of error

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is overruled.

In this trial we find

No error.

Chief Judge MORRIS and Judge WHICHARD concur.

DAVID E. NEWBOLD, ADMINISTRATOR OF THE ESTATE OF ZACK ELWOOD
NEWBOLD v. GLOBE LIFE INSURANCE COMPANY

No. 804SC284

(Filed 17 February 1981)

Insurance § 27.1— credit life and disability insurance

In an action to recover on a policy of credit life and disability insurance issued by defendant where defendant alleged that no charge was made for life insurance but only for disability insurance and therefore that the death of plaintiff's decedent was not the event against which the policy insured, the trial court properly entered judgment for plaintiff, since all policies of "credit, accident and health insurance" issued in the State of N. C. cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." G.S. 58-342(2); G.S. 58-254.8.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 23 January 1980 in Superior Court, ONSLOW County. Heard in the Court of Appeals 17 September 1980.

Plaintiff filed a complaint against defendant on 6 September 1979 alleging that defendant wrongfully refused to pay insurance proceeds following the death of plaintiff's decedent. Plaintiff alleged that his decedent applied to defendant for issuance of an insurance policy on or about 21 March 1978, as evidenced by a "Notice of Proposed Credit Life and Disability Insurance" incorporated by reference into the complaint, and that defendant issued a policy to decedent. The complaint stated that issuance of the policy to plaintiff's decedent was evidenced by a "Certificate of Insurance, Credit Life-Credit Disability Insurance," which was also incorporated by reference, bearing decedent's name and address as "Insured Debtor"; the name and address of the car dealer from which decedent purchased an automobile on credit; and the name and address of the Bank of North Carolina as "Creditor." Plaintiff then alleged that the insurance policy became effective 21 March

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1978, and that his decedent died as the result of a boating accident on 2 April 1978. Plaintiff made formal demand for payment of the insurance proceeds on 12 June 1978 and again on 11 August 1978, and defendant refused payment.

Defendant filed a combined answer and motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), on 11 October 1979. In its motion, defendant contended the court should enter judgment on the pleadings in its favor because the allegations of the complaint demonstrated that plaintiff was not entitled to any relief and that defendant was entitled to judgment as a matter of law. In its answer, defendant alleged that plaintiff's complaint failed to state a claim upon which relief could be granted; admitted that plaintiff's decedent applied for insurance with defendant; denied that the policy of insurance had been issued; admitted that plaintiff's decedent died on 2 April 1978; and admitted that plaintiff demanded payment which defendant refused.

The parties stipulated that the decision on defendant's motion as finally determined on any and all appeals would constitute judgment on the merits. The trial court found defendant was not entitled to the relief sought in its motion and rendered judgment on the merits in favor of plaintiff in the amount of \$6,100.00. From this judgment, defendant appeals.

Bailey, Raynor and Erwin by Frank W. Erwin for plaintiff-appellee.

Wallace, Langley, Barwick and Landis by R. F. Landis, II, and Joseph S. Bower for defendant-appellant.

WHICHARD, Judge.

In its sole assignment of error defendant contends the pleadings and exhibits thereto do not support the judgment and that, on the contrary, they establish that plaintiff has not stated a claim for relief. The parties stipulated that decision on defendant's motion would constitute judgment on the merits. The judgment thus "in effect determines the action," and appeal at this point is proper. G.S. 1-277 (1971).

Under Rule 12(c), a party moving for judgment on the pleadings "is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment."

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Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In passing on the motion "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the non-moving party." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. The motion by defendant thus should be denied if the complaint contains allegations which, if proved, would permit recovery by plaintiff. *See* 5 Wright and Miller, Federal Practice and Procedure, § 1368 at 695 (1969).

When we view plaintiff's complaint in this light, we find that it alleges issuance by defendant to plaintiff's decedent of a credit life-credit disability insurance policy effective 21 March 1978; that plaintiff's decedent died on 2 April 1978; and that plaintiff made formal demand for payment pursuant to the policy, which payment defendant refused. By definition, a valid credit life-credit disability policy issued to decedent prior to death would be payable upon decedent's death. G.S. 58-342(3) (Supp. 1979).¹ Thus, if plaintiff could prove the allegations of his complaint, he would be entitled to the relief sought. The trial court, therefore, properly denied defendant's motion for judgment on the pleadings.

In reviewing the merits of the case, pursuant to the parties' stipulation, the trial court had to consider not only the sufficiency of plaintiff's allegations, but also the sufficiency of his proof and the question of whether defendant had interposed a valid defense. The record reviewed consisted of the complaint, the application for insurance, the certificate of insurance, letters of demand for payment, and refusal thereof, and defendant's answer and motion. Neither plaintiff nor defendant introduced evidence.

Proof of (1) execution and delivery of an insurance policy, (2) payment of premiums thereon, and (3) the happening of the event against which the policy insured, "makes out a *prima facie* case" of liability on a policy of insurance. *Terrell v. Insurance Co.*, 269 N.C. 259, 261, 152 S.E.2d 196, 198 (1967). Here, as to (1), defendant's

¹This section defines credit life insurance as "insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction as defined in G.S. 58-195.2." G.S. 58-195.2 provides:

Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor. Credit life insurance may include the granting of additional benefits in the event of total and permanent disability of the debtor.

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letter to plaintiff's attorney, which is incorporated by reference into the complaint, acknowledges that decedent applied for insurance and that a certificate of insurance was issued to him. As to (2), this letter also admits that plaintiff's decedent paid the premium charged for this insurance by financing the amount of the premium as part of the total indebtedness on the automobile he purchased in the transaction. As to (3), defendant's answer admits that plaintiff's decedent died on 2 April 1978. Defendant contends, however, that the *death* of plaintiff's decedent was not the event against which the policy insured; that the certificate issued represented insurance against *disability only*, and that decedent neither applied for nor obtained a policy insuring against his death. Because the first two requirements set forth in *Terrell* have been met, the sole remaining question is whether the policy, admittedly applied for and issued and on which the premiums admittedly were paid, insured against decedent's death, which admittedly has occurred.

Defendant bases its contention that the death of plaintiff's decedent was not the event insured against on the fact that the certificate of insurance contained the letters "n.a." (for "not applicable") in the space designated "life insurance charge" and contained the figures "\$670.22" in the space designated "total disability insurance charge." It argues that the "disability" policy issued to decedent was a type of "credit accident and health insurance" within the meaning of that term as used in G.S. 58-254.8, which provides as follows:

Credit accident and health insurance is declared to be insurance against death or personal injury by accident or by any specified kind or kinds of accident, and insurance against sickness, ailment, or bodily injury of a debtor who may be indebted to any person, firm, or corporation extending credit to such debtor.

The premise of defendant's contention is that this statute provides for two types of credit accident and health insurance — one insuring against "sickness, ailment, or bodily injury" only, and not against "death or personal injury by accident"; the other insuring against "death or personal injury by accident" — and that the policy it issued was in the first category, insuring against "sickness, ailment, or bodily injury" only. Our review of the legislative history of

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General Statutes Chapter 58, subchapter VIII, article 32, entitled The North Carolina Act for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance [hereinafter the Act], and our interpretation of the intent of the General Assembly in prescribing the Act, lead us to reject the interpretation of G.S. 58-254.8 for which defendant contends.

The initial section of the Act, in pertinent part, provides:

All credit life insurance and all credit accident and health insurance as defined herein and written in connection with . . . consumer credit installment sales contracts of whatever term permitted by G.S. 25A-33 . . . shall be subject to the provisions of this Article The provisions of this Article shall be controlling as to such insurance and no other provisions of this Chapter shall be applicable unless otherwise specifically provided.

G.S. 58-341 (Supp. 1979). The insurance policy issued by defendant to plaintiff's decedent fell within the above provision, and is therefore subject to the regulatory provisions of the Act.

The Act provides for the issuance of two types of credit insurance, (1) credit life insurance, and (2) credit accident and health insurance. G.S. 58-341 *et seq.* (Supp. 1979). Section 58-343 authorizes the forms of insurance which may be issued as follows:

Credit life insurance and credit accident and health insurance shall be issued only in the following forms:

- (1) Individual policies of life insurance issued to debtors on the term plan;
- (2) Individual policies of accident and health insurance issued to debtors on a term plan or disability benefit provisions in individual policies of credit life insurance;
- (3) Group policies of life insurance issued to creditors providing insurance upon the lives of debtors on the term plan;
- (4) Group policies of accident and health insurance issued to creditors on a term plan insuring debtors or disability benefit pro-

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visions in group credit life insurance policies to provide such coverage.

G.S. 58-343 (Supp. 1979). The certificate issued to decedent stated that it was a "Creditor's Group Life and Disability Insurance Policy." The title places the policy within subsections (3) and (4) above as a group credit life policy with "disability benefit provisions in [a] group credit life" policy. The Act defines credit accident and health insurance as "insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction as defined in G.S. 58-254.8" (which is quoted above). G.S. 58-342(2) (Supp. 1979).

The provisions of the Act in its entirety indicate that the phrase "credit accident and health insurance" describes one type of insurance. The terms "accident" and "health" appear conjunctively throughout the Act. The Act in no way states or implies that an insurer may issue either credit accident insurance alone, or credit health insurance alone.

Just as the provisions of the Act indicate that credit accident and health insurance is one type of insurance, the definition of credit accident and health insurance describes a single type of insurance. Section 58-254.8 provides that credit accident and health insurance is "insurance against death or personal injury by accident . . . and insurance against sickness, ailment, or bodily injury." G.S. 58-254.8(1975) (emphasis added). The phrase "against death or personal injury by accident" and the phrase "against sickness, ailment, or bodily injury" are conjunctive and *together* define one type of insurance.

The legislative history of the Act also indicates the intent to provide a single definition of the coverage of all credit accident and health insurance policies. When it drafted the Act, the General Assembly drew most of its provisions verbatim from the National Association of Insurance Commissioners' Model Act to Provide for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance [hereinafter the Model Act]. Significantly, however, it rejected the Model Act definition of credit accident and health insurance. The Model Act provides, in pertinent part, as follows:

B. Definitions

For the purpose of the Act:

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...
(2) Credit accident and health insurance: means insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction while the debtor is disabled as defined in the policy; . . .

The Model Act, National Association of Insurance Commissioners Proceedings (1958). The North Carolina Act incorporates the definition of credit accident and health insurance found in G.S. 58-254.8, which had been adopted in 1958, in place of the phrase "while the debtor is disabled as defined in the policy." By adopting a definition of credit accident and health insurance contained in a pre-existing North Carolina statute, while retaining most other Model Act provisions verbatim, the General Assembly indicated a specific intent to reject the Model Act provision which gave individual insurers control over the coverage of credit accident and health policies. It would appear from this deviation from the Model Act that the legislature intended to provide for uniformity of coverage by requiring that all policies of "credit accident and health insurance" issued in the State of North Carolina cover "death or personal injury by accident" as well as "sickness, ailment, or bodily injury." G.S. 58-342(2) and 58-254.8.

The Act, then, as we interpret it, provides that "disability benefits" may be provided for in policies of credit life insurance, G.S. 58-343(2) and (4) (Supp. 1979); but it does not authorize the issuance of credit insurance against disability only. Its apparent regulatory purpose was to insure that funds would be available with which to pay the debt for payment of which the insurance was obtained, regardless of whether the insured's inability to pay resulted from disability or from death. Because "[t]he laws existing at the time and place of a contract form a part of it", *Boyce v. Gastonia*, 227 N.C. 139, 144, 41 S.E.2d 355, 358 (1947), the contract of insurance here covered decedent's death by accident by virtue of the provisions of General Statutes Chapter 58, subchapter VIII, article 32. The trial court thus properly entered judgment for plaintiff on the merits, and its judgment is

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

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DONNA LAPER FAUGHT v. WILLIAM FLENER FAUGHT

No. 8014DC628

(Filed 17 February 1981)

1. Appeal and Error § 17— order for alimony and counsel fees — stay bond pending appeal — dismissal of appeal for failure to post bond

Portions of a judgment requiring defendant to pay alimony and counsel fees constituted a "judgment directing the payment of money" within the meaning of G.S. 1-289, and the court had authority under the statute to require defendant to post a bond in order to stay execution pending appeal of the judgment. However, the court did not have the authority under G.S. 1-289 to dismiss defendant's appeal for failure of defendant to post the required bond but had authority only to dissolve any stay already issued.

2. Appeal and Error § 17— order requiring transfer of property — dismissal of appeal for failure to post stay bond

While G.S. 1-290 and G.S. 1-292 gave the court authority to stay execution on a judgment requiring the parties to transfer personal and real property upon the posting of a bond, the court had no authority to dismiss an appeal for the appellant's failure to post the bond.

APPEAL by defendant from *LaBarre, Judge*. Order entered 5 March 1980 in District Court, DURHAM County. Heard in the Court of Appeals 15 January 1981.

This is an appeal from an order dated 5 March 1980 dismissing defendant's appeal from an order entered in the District Court on 27 December 1979 in a proceeding wherein plaintiff sought alimony and counsel fees, and a "division of joint properties of the marriage." After a hearing on plaintiff's claim the trial judge made detailed findings and conclusions, and by order dated 27 December 1979, the trial court provided:

1. That the defendant pay to the plaintiff as permanent alimony, the sum of Twelve Hundred Sixty Dollars (\$1,260.00) per month beginning December 1, 1979 and on the first of each month thereafter until the plaintiff's death or remarriage. That this sum be paid monthly as specified to the Clerk of Superior Court of Durham County on behalf of and for disbursement to the plaintiff.

2. That the defendant shall maintain full health insurance coverage, including major medical benefits on behalf of the plaintiff either through military insurance

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provided while they were married or private insurance provided upon their divorce or military benefits otherwise being terminated.

3. That from the funds presently being held by Branch Banking and Trust Company in Certificate of deposit number 335-3010017, the sum of Eight Thousand Nine Hundred Forty Dollars (\$8,940.00) be paid to the plaintiff to be designated for the following purposes: (a) Five Thousand Forty Dollars (\$5,050.00) [sic] as alimony for the months of August, September, October and November, 1979; (b) Fourteen Hundred Dollars (\$1,400.00) as reasonable attorney fees to be paid to the attorney for the plaintiff; (c) Two Thousand Five Hundred Dollars (\$2,500.00) as a lump sum distribution. That the balance of the funds being held in the certificate of deposit should be distributed to the defendant for the purpose of offsetting those debts which have been deemed his sole responsibility.

4. That the defendant promptly transfer any and all interest he has in that townhouse located at 170 Ridge Trail, Chapel Hill, North Carolina to the plaintiff, upon her agreement to assume the outstanding balances owed on the two Deeds of Trust presently encumbering said property. That this transfer is conditioned upon the plaintiff voluntarily transferring any and all interest she owns in that condominium located at 1803 Sea Watch, Ocean City, Maryland to the defendant upon his agreement to assume the outstanding balances owed on the two mortgages presently encumbering that property.

5. That any rents presently being held by Leland Realty as rental agent for the condominium at 1803 Sea Watch, Ocean City, Maryland be divided equally between the parties and disbursed to them.

6. That the furniture presently in the possession of each of the parties is deemed owned by each of them individually. That those items of furniture and personal property shown on the list attached hereto and incorporated herein by reference which are presently stored with United Van Lines, Inc. are deemed the sole property of the plain-

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tiff, with the exception of the items designated under the paragraph entitled "Crystal, China, Glass and Figurines", referring to various barrels of personal property in storage. That those items of personal property located within the barrels which are identified by the plaintiff as having been given specifically to her are deemed her sole property. That the remaining items located within those barrels and any other items of furniture or personal property that are in storage and not specifically listed on the attached list, are deemed to be the joint property of the parties.

7. That the outstanding claim against Armed Forces Cooperative Insurance Association for items lost or damaged intransit [sic] is deemed the joint property of the parties, and should be processed in the name of the defendant expeditiously, with any proceeds realized from said claim being divided equally between the plaintiff and the defendant when received.

8. That the outstanding balances owed on the loans from Michael Faught and Mark Laseau are deemed the joint property of the parties and any proceeds realized from either loan are to be divided equally between the parties when received.

9. That the defendant shall pay any and all debts owed by the parties, with the exception of: (a) any income tax liability arising from capital gains realized from the sale of the parties' jointly owned residences at 1002 Danton Lane, Alexandria, Virginia and 8253 Doctor Craik Court, Alexandria, Virginia, (b) the outstanding balance owed by the plaintiff on her individual car loan; (c) and the monies owed by the plaintiff to her mother, Roxie Scott Laper.

10. That the costs of this action shall be taxed to the defendant.

On 4 January 1980, defendant gave notice of appeal from the foregoing order, and thereafter made a motion pursuant to G.S. § 1A-1, Rule 62(d) for "a stay of proceeding" pending the appeal. This motion was allowed by an order dated 22 January 1980. Also on 22

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January 1980, plaintiff filed a motion for an order requiring defendant, having obtained a "Stay of Execution," to post a "cash bond" pursuant to G.S. §§ 1-289, 290, and 292. The court allowed plaintiff's motion the same day, ordering that defendant post a bond in the sum of \$45,500 "in order to protect the interest of the plaintiff/appellee under the judgment pending the appeal" On 13 February 1980, plaintiff, pursuant to G.S. § 1-289 *et. seq.*, moved that the appeal be dismissed for defendant's failure to post the bond, or in the alternative to dissolve the stay of execution. On 5 March 1980, the court entered two orders, one dismissing defendant's appeal from the 27 December 1979 order for his failure to post the bond required by the 22 January 1980 order, and the other dissolving the stay of execution granted on 22 January 1980.

From the order dated 5 March 1980 dismissing his appeal from the 27 December 1979 order, defendant appealed to this Court.

Maxwell, Freeman, Beason and Lambe, by Homa J. Freeman, Jr., for the plaintiff appellee.

Timothy E. Oates, for the defendant appellant.

HEDRICK, Judge.

The sole question presented by this appeal is whether the trial court erred in dismissing defendant's appeal from the order entered 27 December 1979. Resolution of this question requires an examination of G.S. § 1-289, the statute upon which Judge LaBarre purported to dismiss the appeal, and G.S. § 1-294.

G.S. § 1-289 in pertinent part provides:

If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that

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since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion of the court, be dismissed with costs The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; . . .

G.S. § 1-294 in pertinent part provides:

When an appeal is perfected as provided by this article, it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

[1] We perceive G.S. § 1-289 to be an exception to G.S. § 1-294, which provides the general rule regarding the stay of proceedings pending appeal, and in our view, G.S. § 1-289 is applicable only in cases involving a “judgment directing the payment of money.” Our courts have generally held that an order requiring the payment of alimony is a “judgment directing the payment of money.” *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940); *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492 (1937). G.S. § 1-289 is then applicable to the order dated 27 December 1979 in the present case insofar as that order directs defendant to pay *alimony* and *counsel fees*. Therefore, the appeal from the order requiring defendant to pay alimony and counsel fees did not automatically stay execution on the judgment, and the trial court had the authority, in accordance with G.S. § 1-289, to require defendant to “execute a written undertaking” in order to stay execution. We point out that execution would only be available, and thus G.S. § 1-289 would only be applicable, for past due installments of alimony; with respect to the payment of alimony *in futuro*, no indebtedness would arise upon which execution could issue until each installment became due. *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959); *Barber v. Barber*, *supra*. See also 27B C.J.S. Divorce § 265; 24 Am. Jur. 2d Divorce and Separation § 709.

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In the present case, when defendant failed to post the bond required by the 22 January 1980 order, plaintiff moved to "dismiss the appeal . . . or in the alternative" to have the stay dissolved. Obviously, under G.S. § 1-289, if the appellant fails to give the bond required, execution on the judgment would not be stayed. The trial court, in its 5 March 1980 orders, proceeded to dissolve the stay and dismiss the appeal. There is nothing in the record to indicate that plaintiff caused execution to issue either before defendant was granted the stay of execution or after the trial court dissolved that stay.

Plaintiff argues that the trial court had the authority pursuant to G.S. § 1-289 to dismiss the appeal because defendant failed to post the bond required by the 22 January 1980 order. We do not agree. The court had the authority to order a stay of execution upon the posting of the bond, and we think had the authority to dissolve any stay already issued when the bond was not posted. G.S. § 1-289 provides that after the bond is posted and a stay of execution is ordered,

[w]henever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs.

In our view, the authority of the court to dismiss the appeal under G.S. § 1-289 is limited to those cases wherein a stay is ordered pursuant to the posting of a bond or similar "undertaking," and thereafter it is "made to appear" to the court that the surety or sureties on the bond have become insolvent, and a new undertaking is ordered, after which the appellant fails to execute the new undertaking within twenty days of service of that order or rule upon him. The last quoted portion of G.S. § 1-289 is obviously inapplicable to the present case since defendant never posted any bond to stay execution on the judgment. *A fortiori*, the trial court had no authority to dismiss the appeal for defendant's failure to "execute, file and serve a new undertaking."

[2] With respect to those parts of the order dated 27 December

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1979 requiring the parties to transfer either personal or real property, the propriety of which we do not consider on the present appeal, G.S. § 1-289 has no application. G.S. §§ 1-290 and 1-292 apply to judgments requiring the "assignment or delivery" of personal property and the "sale or delivery of possession" of real property. While these statutes give the court authority to stay execution on a judgment upon the posting of a bond, the court has no authority to dismiss an appeal for the appellant's failure to post the bond. The requirement that a bond be posted pursuant to G.S. §§ 1-290 and 1-292 is not a condition to defendant's right of appeal. *See In re Foreclosure of Deed of Trust*, 50 N.C. App. 413, 273 S.E.2d 738 (1981).

For the reasons stated, the order dismissing the appeal from the order dated 27 December 1979 is vacated, and the cause is remanded to the District Court for the entry of an order allowing defendant to perfect his appeal from the order dated 27 December 1979. The order to be entered by the District Court will provide that defendant has sixty days from the date of said order in which to prepare and serve a proposed record on appeal, that plaintiff has thirty days thereafter to prepare and serve an alternate record on appeal, and that the record on appeal must be filed with the Court of Appeals within 150 days of the entry of such order.

Vacated and remanded.

Judges MARTIN (Robert M.) and CLARK concur.

MATTIE CAUDLE AND HUSBAND, LANCY CAUDLE, SR., KATHRYN H. PERCELL, AND HUSBAND, ROBERT L. PERCELL, JAMES BULLOCK, THEATRICE BULLOCK, LONNIE BULLOCK, AND W. H. HOLDING v. HERMAN RAY

No. 8010SC694

(Filed 17 February 1981)

Attorneys at Law § 3.1— attorney's consent to judgment — presumption of authority — rebutting evidence

The trial court's determination that an attorney's consent to the entry of a judgment against plaintiffs based on a referee's report was "within the scope of his authority as attorney of record for Plaintiffs" was erroneous where the

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presumption of authority was rebutted by plaintiffs' plenary evidence that the attorney had no such authority.

APPEAL by plaintiffs from *Preston, Judge*. Order entered 28 March 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1981.

Plaintiffs own as tenants in common a tract of land in Wake County. In January 1976 they contracted to sell the standing timber on the land. When defendant represented to the prospective purchaser that he was the owner of the property and would interfere with cutting of the timber, the prospective purchaser refused to pay plaintiffs the contract price. Plaintiffs then brought this action seeking damages and an order restraining defendant from interfering with their peaceful possession of the land and with the proposed removal of timber. Defendant answered praying that plaintiffs be declared to have no interest in the disputed tract and that he be declared to be the owner free and clear of any claim of plaintiffs.

On 16 December 1976 Judge Donald L. Smith entered an order appointing a referee to establish the lines of plaintiffs and defendant. Thereafter on 18 May 1977 Judge E. Maurice Braswell entered judgment finding that the referee had filed his report on 25 March 1977 and that no objection had been made to the report. The judgment incorporated the referee's report by reference; declared the common line between the lands of plaintiffs and of defendant; declared that plaintiffs had no rights in the lands shown on the referee's report; declared that defendant was the owner of the lands shown on the plat, free and clear of any claim of plaintiffs; and taxed the costs to plaintiffs. The judgment was consented to by Earle R. Purser as attorney for plaintiffs and by Henry H. Sink as attorney for defendant.

On 22 June 1979 plaintiffs filed a motion pursuant to G.S. 1A-1, Rule 60(b)(4) to vacate the judgment entered 18 May 1977. They alleged as grounds for the motion that they had retained Attorney Purser to draw the deed for sale of the timber on the land which they believed they owned; that thereafter the prospective purchaser was prevented from removing the timber by defendant, and plaintiff Lancy Caudle sought Purser's assistance; that Purser filed the complaint in this action purportedly on behalf of plaintiffs, but that in fact only the plaintiff Lancy Caudle had knowledge that suit was being filed, and that because of advanced years and lack of education he did not understand that a lawsuit had been filed

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against defendant; that Purser consented to the reference and to the judgment, and that plaintiffs did not learn that a judgment had been entered against them until efforts were made to execute on the judgment for costs; and that, as a result, the court lacked jurisdiction to enter a judgment binding upon plaintiffs "at the bequest (sic) of an attorney, who acts with neither the knowledge nor authorization of his alleged clients." Plaintiffs prayed that the judgment be vacated and set aside.

Plaintiff Robert L. Percell filed an affidavit in which he stated under oath that he did not participate in any action brought against defendant; that he never instructed nor authorized anyone to consent to a judgment in this action on his behalf; and that he learned of the judgment for the first time when the sheriff came to his premises to execute on the judgment for costs. Plaintiff Lancy Caudle filed an affidavit in which he stated under oath that he initially approached attorney Purser for the purpose of obtaining a restraining order against defendant, and that he did not understand that in order to obtain the restraining order a suit had to be filed; that he "signed that action based upon the facts as they were presented to [him] by Attorney Purser"; that he cannot read and, except for being able to write his name, he is illiterate; that he was never apprised as to the status of the case until his nephew, plaintiff Robert Percell, came to tell him the Sheriff had come to his house to execute on the judgment; and that at no time did he or "anyone in [his] group" advise Attorney Purser to consent to a judgment against the plaintiffs. Kathryn L. Percell, W. H. Holding, James Bullock, Theatrice Bullock, Mattie Caudle and Walter Caudle¹ also filed affidavits. All alleged absence of personal knowledge that this suit had been filed naming them as party plaintiffs, and that the entry of judgment had been without their knowledge or consent.

On 28 March 1980 Judge Edwin S. Preston, Jr., entered an order denying plaintiffs' motion to vacate and set aside the judgment. The order contains the following recital:

And it further appearing to the Court and the Court finds as facts that at all times up to and including the entry of the Judgment in this action; Earle R. Purser was the attorney of record for Plaintiffs and that as attorney

¹ Walter Caudle identified himself in his affidavit as a party plaintiff in this action. The record before us does not contain his name in the captions.

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of record all of the actions of said Earle R. Purser for and on behalf of Plaintiffs were within the scope of his authority as attorney of record for Plaintiffs, and the Court further finds as a fact that the Court, and attorneys for Defendant at all times through the entry of Judgment in this action were entitled to [rely] upon the acts of said Earle R. Purser as attorney of record for Plaintiffs, that said Judgment sought to be vacated is not void and that Plaintiffs are not without recourse as to any damages which they may have suffered.

From this order, plaintiffs appeal.

Shyllon, Shyllon and Ratliff, by Mohamed M. Shyllon, for plaintiff appellants.

Parker, Sink and Powers, by Henry H. Sink, Jr. and Henry H. Sink, for defendant appellee.

WHICHARD, Judge.

The record contains no exceptions and no assignments of error. Because the scope of review on appeal is limited to “a consideration of those exceptions set out and made the basis of assignments of error in the record,” Rule 10(a), Rules of Appellate Procedure, no alleged error is properly before us for review. We have, however, chosen to consider the contentions presented in appellants’ brief by exercising the power vested in us by Rule 2, Rules of Appellate Procedure, to suspend the requirements of Rule 10(a) for purposes of this appeal “[t]o prevent manifest injustice to a party.”

It is well-established that “[i]n this jurisdiction there is a presumption in favor of an attorney’s authority to act for the client he professes to represent.” *Greenhill v. Crabtree*, 45 N.C. App. 49, 51, 262 S.E.2d 315, 316 *affirmed* 301 N.C. 520, 271 S.E.2d 908 (1980) (affirmed by an equally divided court and therefore without precedential value). In *Gardiner v. May*, 172 N.C. 192, 196, 89 S.E. 955, 957 (1916), our Supreme Court stated:

A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have

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sacrificed his right.

A presumption that Attorney Purser had authority to act for his clients here thus arose upon entry of the consent judgment, and "[i]t then [became] the burden of the client[s] to rebut this presumption and to prove lack of authority to the satisfaction of the court." *Greenhill*, 45 N.C. App. at 52, 262 S.E.2d at 317.

Plaintiffs offered eight affidavits for the purpose of rebutting the presumption that Attorney Purser had authority to act for them in consenting to the judgment which they now seek to vacate and set aside. Each affidavit unequivocally denied that Purser was vested with such authority. These affidavits constitute the only evidence in the record. The record is thus devoid of evidence tending in any way to indicate that Purser did have authority from plaintiffs to consent to the judgment on their behalf.

The trial court's "finding of fact" that Purser's actions "were within the scope of his authority as attorney of record for Plaintiffs" is "in reality, [a] legal [conclusion] determinative of the rights of the parties." *Warner v. W & O, Inc.*, 263 N.C. 37, 40, 138 S.E.2d 782, 785 (1964). "The listing of what is in reality a legal conclusion as a fact, when . . . not supported by the evidence, has no efficacy." *Warner*, 263 N.C. at 40, 138 S.E.2d at 785. The record here contains no evidence from which the trial court could have made findings of fact to support its legal conclusion that the attorney's actions were within the scope of his authority to act for plaintiffs. The presumption of authority, standing alone, was not sufficient to sustain the order when countered by plenary evidence in rebuttal. Hence, the court's legal conclusion is "not supported by the evidence, and has no efficacy."

We hold that on the facts contained in the record before us the order of 28 March 1980 was erroneous, and it is therefore vacated. We do not determine whether plaintiffs are entitled to have granted their motion to vacate and set aside the judgment of 18 May 1977. That determination is a proper function for the trial court upon our remand herewith for further proceedings consistent with this opinion.

Vacated and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

Green v. Power Co.

ANDREA D. GREEN, BY HER GUARDIAN AD LITEM, KENNETH R. DOWNS, AND HENRY FRANK GREEN, PLAINTIFFS V. DUKE POWER COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF V. HENRY THOMAS EANES AND HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, NORTH CAROLINA, THIRD-PARTY DEFENDANTS

No. 8026SC637

(Filed 17 February 1981)

Appeal and Error § 6.2— summary judgment for third party defendants — order interlocutory — no substantial right affected — order not appealable

In an action to recover damages for injuries received by plaintiff when she came into contact with the interior wiring of an electrical transformer where defendant sought contribution from third party defendants as joint tort-feasors, the trial court's order entering summary judgment for third party defendants adjudicated fewer than all the claims or rights and liabilities of all the parties, no substantial right of plaintiff was affected, and the trial judge refrained from and refused to certify the case for appeal so that plaintiff's appeal was interlocutory and must be dismissed.

APPEAL by defendant and third-party plaintiff from *Burroughs, Judge*. Judgments entered 26 February 1980 and 5 March 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 January 1981.

Plaintiff Andrea Green (Andrea), a minor, and plaintiff Henry Frank Green, Andrea's father, brought suit against defendant Duke Power Company (Duke) to recover damages for injuries received by Andrea when she came into contact with the interior wiring of a ground level electrical transformer and to recover expenses for her subsequent medical treatment. Defendant Duke brought a third-party action against defendants Eanes and Housing Authority (Authority) seeking contribution from each of them as joint tort-feasors.

After the pleadings were joined, the parties submitted and obtained responses to requests for admissions, interrogatories, and requests for production of documents. Defendants Eanes and Authority then moved for summary judgment. After a hearing, their motions were granted. In its judgments, the trial court did not certify (pursuant to G.S. 1A-1, Rule 54) that there was no just reason for delay. Duke gave timely notice of appeal from these judgments on 21 February 1980.

On 27 March 1980, Duke moved the trial court for an order

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staying the trial of the case pending final resolution of Duke's appeal from the summary judgments. On 15 May 1980, Duke obtained an order extending time to serve their proposed record on appeal to 6 June 1980. On 30 May 1980, Duke filed a motion "pursuant to Rule 54 of the Rules of Civil Procedure" to amend the judgments for the third-party defendants to include a finding by the trial court that "there is no just reason for delay". On 5 June 1980, the trial court entered an order denying this motion and an order denying Duke's motion to stay the trial pending resolution of Duke's appeal.

Duke's appeal was docketed in this Court on 30 June 1980. On 3 July 1980 and 7 July 1980 respectively, Eanes and Authority moved this Court to dismiss Duke's appeal as interlocutory. On 3 July 1980, Duke petitioned this Court for a writ of supersedeas to stay the trial of the action between plaintiffs and Duke, pending the determination of Duke's appeal from the judgments in favor of Eanes and Authority. On 17 July 1980, a panel of this Court entered orders denying Eanes' and Authority's motions to dismiss Duke's appeal and allowing Duke's petition for a writ of supersedeas.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III, for defendant and third-party plaintiff appellant Duke Power Company.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, for third-party defendant appellee Eanes.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for third-party defendant appellee Housing Authority of the City of Charlotte, North Carolina.

WELLS, Judge.

Although Eanes' and Authority's motions to dismiss Duke's appeal as interlocutory were denied by another panel of judges of this Court, and although this question was not argued by either party before this Court, we believe that the opinion of our Supreme Court in *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980) requires us to consider the question and to dismiss this appeal.

In *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980), *appeal dismissed*, 301 N.C. 92, 273 S.E. 2d 298 (1980), we discussed at length the certification requirement of G.S. 1A-1, Rule 54(b). In that opinion, we recognized that the Rule 54(b) procedure

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establishes the trial court as the "dispatcher" of appeals to the appellate division. This vital role of the trial courts has been sanctioned and upheld by our Federal courts, interpreting the provisions of Federal Rule 54(b) from which our Rule was taken.¹

Following our model in *Leasing Corp.*, *supra*, at 170, 265 S.E. 2d at 246, we must first determine whether the entry of summary judgment in favor of the third-party defendants Eanes and Authority affects a substantial right of third-party plaintiff Duke, so as to by-pass the Rule 54(b) procedure through application of the provisions of G.S. 1-277 or 7A-27. We hold that no such substantial right has been affected in this case because by preserving its exception to the granting of the summary judgments, Duke has preserved its right to pursue its claims against the third-party defendants *in the event of judgment for the plaintiffs against Duke*.

Duke asserts that it has a substantial right to have its claim for contribution against the third-party defendants tried before the same court and jury which tries plaintiffs' claims against it. In support of its argument, Duke cites *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976) and *Heath v. Board of Commissioners*, 292 N.C. 369, 233 S.E. 2d 889 (1977). We believe both *Oestreicher* and *Heath* must be distinguished from the case *sub judice*. As Chief Justice Sharp succinctly pointed out in her concurrence in *Oestreicher*, that case involved but one claim for relief, which presented issues for compensatory and punitive damages. In agreeing that plaintiff was entitled to the substantial right of having these two *issues* tried before the same court and jury, Justice Sharp said: "In such a situation, however, multiple claims are not involved. [W]hen

¹ See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 100 L.Ed. 1297, 76 S.Ct. 895 (1956), in which we find the following language:

To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure. Its "negative effect" has met with uniform approval.

351 U.S. at 435, 100 L.Ed. at 1306, 76 S.Ct. at 899-900. This subject was again before the United States Supreme Court in *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 64 L.Ed. 2d 1, 100 S.Ct. 1460 (1980), where the Court reached a similar conclusion and quoted with approval pertinent language from *Sears*.

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plaintiff is suing to vindicate one legal right and alleges several elements of damage, only one claim is presented and subdivision (b) [of Rule 54] does not apply.” *Oestreicher v. Stores*, *supra*, at 145, 225 S.E. 2d at 813-14.

Heath involved no interpretation of Rule 54(b). That Rule is not mentioned in the opinion. *Heath* dealt with the impact of the adoption of G.S. 1A-1, Rule 14 on the time at which a cause of action for indemnification arises. While we find no argument with the Court’s statements about the purposes of Rule 14 found in *Heath*, such statements are mere dicta vis a vis the Rule 54(b) issue in this case.

Following the trial of plaintiffs’ actions against Duke, if judgment is entered against it, it may then seek contribution from Eanes and the Authority as joint tort-feasors. G.S. 1B-1; *Pearsall v. Power Co.*, 258 N.C. 639, 129 S.E. 2d 217 (1963). The entry of summary judgment in favor of Eanes and the Authority in this case did not have the effect of destroying, impairing, or seriously imperiling Duke’s right to seek such contribution. *See Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). The avoidance of a separate trial on Duke’s separate claims is not such a substantial right as would justify the by-passing of Rule 54(b) requirements which Duke seeks in this appeal. *See Cook v. Tobacco Co.*, 47 N.C. App. 187, 266 S.E. 2d 754 (1980).

No substantial right being involved, and it being obvious that the judgments entered adjudicate fewer than all the claims or the rights and liabilities of all the parties, Rule 54(b), and the trial judge having refrained from and refused to certify this case for appeal, the appeal is interlocutory and must be dismissed. *See Bailey v. Gooding*, *supra*.

This appeal is

Dismissed.

The writ of supersedeas previously issued in this case is hereby
Dissolved.

Judges ARNOLD and MARTIN (Robert M.) concur.

Golden v. Register

MARY GOLDEN, ADMINISTRATRIX OF THE ESTATE OF CLIFFORD FRANKLIN GOLDEN
v. RANDY REGISTER AND ROBERT TYNDALL

No. 803SC533

(Filed 17 February 1981)

Negligence § 35.4— minor injured during tobacco harvesting — contributory negligence

In an action to recover for the alleged wrongful death of plaintiff's son when he was run over by a truck operated by one defendant while both were employed by the other defendant on his farm, directed verdict for defendants was properly entered on the ground that plaintiff's 14 year old son was contributorily negligent as a matter of law where the evidence tended to show that he had worked on a farm during the previous summer; for three weeks prior to his death he had worked for defendant farm owner; he and his young fellow workers had been warned of the danger of "skiing" behind and under a $\frac{3}{4}$ -ton truck used to carry tobacco racks; the operation of the truck and the loading of the tobacco racks, hauling them away from the harvester, and returning to the harvester loaded with empty racks was done routinely, and deceased knew or should have known how the truck approached and circled the harvester, stopped, and backed up near the harvester for unloading; in defiance of a warning or warnings, deceased and his companion began "skiing" when the truck was about 500 feet from the harvester; and deceased's companion lost his grip and fell from the slow moving truck without injury, while deceased continued "skiing" as the truck circled the harvester and stopped.

APPEAL by plaintiff from *Stevens, Judge*. Judgment entered 2 November 1979 in Superior Court, CRAVEN County. Heard in the Court of Appeals 6 January 1981.

Plaintiff seeks to recover for the alleged wrongful death of her son, Frankie, aged 14 at the time of death on 18 July 1974 when he was run over by a truck operated by defendant Randy Register while he and Frankie were employed by defendant Robert Tyndall on his farm.

It is admitted in the pleadings that defendant Tyndall employed Frankie Golden, Randy Register and other young boys for part-time work on his farm. In harvesting his tobacco crop Tyndall utilized a mechanized, self-propelled, four-row tobacco harvester, two tiers or stories high. Frankie was employed as a tobacco primer to work on and in connection with the harvester. A $\frac{3}{4}$ -ton truck was used to pick up the loaded racks or trays of tobacco from the harvester in the fields, take them to the curing or storage barns and return with empty racks to the harvester.

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Plaintiff alleged that defendant Tyndall was negligent *per se* in that he hired Frankie Golden, under 16 years of age, for work on or around power-driven machinery in violation of G.S. 110-6. Defendants moved for summary judgment "on the ground that there is no genuine . . . issue of material fact entitling the plaintiff to prevail on the question of negligent hiring of the plaintiff's intestate by the defendant . . ." The trial court allowed summary judgment "relating to the issue of negligence with respect to employment in violation of [G.S. 110-6]."

At trial the plaintiff's evidence tended to show the following:

In harvesting his tobacco crop defendant Tyndall used two self-propelled tobacco harvesters. Six or seven workers were used on each harvester; four sat in seats close to the ground and picked the leaves from the stalks as the harvester moved slowly between the tobacco rows. The leaves were loaded into racks. When full, the racks were removed from the harvester by the workers and loaded on a flat-bed $\frac{3}{4}$ -ton truck, which carried the racks to the storage or curing barns. The truck then returned with empty racks to the harvester and backed up near the harvester for removal of the racks from the truck to the harvester. Defendant Tyndall employed several boys, including Frankie Golden, under 16 years of age, on a part-time basis to work on the harvesters and paid them an hourly wage. Defendant Register, aged 18, nephew of defendant Tyndall, operated one of the $\frac{3}{4}$ -ton trucks. He had been employed on a part-time basis by Tyndall for several years.

Frankie Golden had been working for Tyndall about three weeks before his death on 18 July 1974. Three days before the 18th, defendant Register observed Frankie and two other young boys "skiing" behind his $\frac{3}{4}$ -ton truck by placing their hands through holes located in and near the rear of the truck bed. Register warned them. Defendant Tyndall testified that only on one occasion had he heard that several young boys were observed "skiing," and that he warned them as a group.

On the morning of the 18th, defendant Register drove the truck, loaded with tobacco-filled racks, from the harvester to the barn. He was returning with empty racks on a dirt road when he saw Wilbur Hicks, Frankie Golden, and Michael Foreman beside the road about 500 feet from the harvester. He stopped the truck to give them a ride to the harvester. They jumped on the truck bed. He

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could not see to the rear by using the inside rearview mirror. The truck had outside rear mirrors, and he could only see the feet of Hicks hanging from the passenger side of the truck bed.

Frankie Golden and Foreman jumped from the truck bed, held on to the truck bed through holes in the bed and began skiing. Foreman fell off when his feet struck some grass in the dirt road. Defendant Register slowly drove the truck around the harvester, stopped, looked in the outside rearview mirror and saw nothing behind him. He thought the boys were on the truck. He did not yell or blow the horn. He had instructed all the boys previously to wait until he backed the truck near the harvester before they began unloading the empty racks from the truck and placing them on the harvester. In circling, stopping, and backing the truck to the harvester he was following a routine which was known by all of the workers. He backed the truck slowly for 5 or 6 feet when he heard a yell. He stopped the truck, got out, and saw Frankie Golden lying under the truck. Frankie was conscious and said he could not breathe. Frankie died shortly after reaching the hospital.

At the close of plaintiff's evidence the defendants moved for a directed verdict. The motion was granted.

Kennedy W. Ward for plaintiff appellant.

Ward and Smith by John A. J. Ward and Stith and Stith by F. Blackwell Stith for defendant appellees.

CLARK, Judge.

In determining whether the trial court erred in granting the defendants' motion for directed verdict, we elect first to direct our attention to the question of contributory negligence on the part of Frankie Golden, deceased, because this question is conspicuously raised by the evidence in the record on appeal. In doing so we do not concede or infer that there was sufficient evidence to warrant submission to the jury of the issue of negligence by the defendants, or either of them.

And in first going directly to the contributory negligence issue, we do not consider whether the trial court erred in ruling that there was no actionable negligence by defendants for violation of G.S. 110-6, which prohibits the employment of youths under 16 years of age for farm work in and around power-driven machinery.

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However, we note that G.S. 110-6 was repealed by the Wage and Hour Act of 1979 (Ch. 839), effective 1 July 1979, and is now supplanted largely by G.S. 95-25.5 and G.S. 95-25.23. We note too that G.S. 95-25.14 now totally exempts workers engaged in agriculture from the requirements of the Wage and Hour Act of 1979. Further, if defendant Tyndall violated G.S. 110-6, which was then still in effect, by employing 14-year-old Frankie Golden in the summer of 1974 to work on his tobacco harvester, the plaintiff would still have the burden of proving proximate cause, the causal connection between the statutory violation and Frankie's death from being crushed by the truck at a time when Frankie was not engaged in doing the work which he was employed to do.

It appears obvious to us that Frankie Golden was contributorily negligent as a matter of law, and that the directed verdict for defendants was properly entered.

The deceased was 14 years of age at the time of his death, having attained that age on 1 November 1973. He did not have the benefit of the established rule that a person between the ages of seven and fourteen is presumed to be incapable of contributory negligence and may not be held contributorily negligent as a matter of law. *Weeks v. Barnard*, 265 N.C. 339, 143 S.E. 2d 809 (1965); *Wooten v. Cagle*, 268 N.C. 366, 150 S.E. 2d 738 (1966). After reaching the age of 14 there is a rebuttable presumption that the youth possessed the capacity of an adult to protect himself, and he is therefore presumptively chargeable with the same standard of care for his own safety as if he were an adult. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967); *Edwards v. Edwards*, 3 N.C. App. 215, 164 S.E. 2d 383 (1968); 9 Strong's N.C. Index, *Negligence*, § 18. In the case *subjudice* there was no attempt to rebut the presumption of the deceased's capacity to exercise due care for his own safety, or to show that he was lacking in the ability, capacity, or intelligence of the ordinary 14-year-old boy.

In determining whether Frankie Golden was contributorily negligent as a matter of law, we find particularly significant the evidence tending to show the following: Frankie had worked on a farm during the summer of 1973, earning \$20.00 per day. For three weeks prior to his death on 18 July 1974 he had worked for defendant Tyndall. He and his young fellow workers had been warned of the danger of skiing behind and under the $\frac{3}{4}$ -ton truck. The opera-

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tion of the truck in the loading of the tobacco racks, hauling them away from the harvester, and returning to the harvester loaded with empty racks was done routinely and Frankie knew or should have known how the truck approached and circled the harvester, stopped, and backed up near the harvester for unloading. In defiance of a warning or warnings, Frankie and his companion, Michael Foreman, began skiing when the truck was about 500 feet from the harvester; Michael lost his grip and fell from the slow-moving truck without injury. Frankie continued skiing as the truck circled the harvester and stopped.

We think it is clear that Frankie knowingly engaged in hazardous horseplay; that he could have released his hold and stopped skiing at any time without injury to himself; that he continued in the dangerous conduct as the truck neared and circled the harvester until it stopped to back up. It does not appear from the evidence whether Frankie lost his grip and fell under the wheel of the truck or intentionally released his grip and attempted to crawl from under the truck when it stopped. In either event it is manifest that he failed to use due care for his own safety, and his contributory negligence bars recovery.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

S. JANSON GRIMES, SUBSTITUTE TRUSTEE V. SEA & SKY CORPORATION AND
BILLY E. BRYANT

No. 8028SC696

(Filed 17 February 1981)

**Mortgages and Deeds of Trust § 17.1— payment of portion of note amount for
subordination agreement — no prepayment of installments**

Where defendants executed a \$37,000 note and deed of trust for the balance due on the purchase price of land, the note was payable by ten semiannual payments of \$3,700 plus interest beginning on 27 May 1979, it was necessary for defendants to have this deed of trust subordinated to a construction loan deed of trust in order to obtain funds to erect a building on the land, on 23 February 1979 the holders of the note executed a subordination agreement upon payment by defendants of \$30,000 on the note, the same date the parties agreed that upon payment of \$7,000 on 15 March 1979 the deed of trust would be cancelled of

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record, and neither party directed application of the \$30,000, the trial court properly held that the \$30,000 payment was not a mere prepayment of installments of the indebtedness but was given as consideration for the subordination agreement, that the \$30,000 payment did not alter the provision of the note requiring the payment of \$3,700 plus interest on 27 May 1979, and that the note was in default and the deed of trust was subject to foreclosure when defendants failed to make the 27 May payment, since it is apparent from the record that the intent of the parties was to reduce the most precariously secured portion of the debt, that which was due furthest in the future.

APPEAL by defendants from *Allen, Judge*. Order signed 29 February 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 February 1981.

On 27 November 1978, the corporate defendant executed a deed of trust and note in the amount of \$37,000. Defendant Bryant signed only in his capacity as president of the corporation and is not personally liable. The documents secured the balance due on the purchase price of the real property described in the deed of trust. The note was payable by ten semiannual payments of \$3,700 plus interest each, commencing 27 May 1979.

After the closing, defendants attempted to obtain financing for an office building to be erected upon the land subject to the deed of trust. It was necessary for defendants to have this deed of trust subordinated to the financing deed of trust in order to obtain the additional loan. Extended negotiations took place between Mr. and Mrs. Barlas, the holders of the note and deed of trust, and defendants, which finally resulted in an agreement. On 23 February 1979, the Barlases accepted a payment of \$30,000 on the note and executed a subordination agreement in favor of the lender of the construction funds. On the same date, Mr. Barlas and defendant Bryant agreed that upon payment of \$7,000 on 15 March 1979 to the noteholders, the deed of trust would be canceled of record. Neither defendant paid the Barlases the \$7,000 on or before 15 March 1979.

When defendants failed to pay the first installment on the note on 27 May 1979, plaintiff filed a motion for and notice of hearing on order of foreclosure with the clerk of superior court. Defendants did not file a response to the pleading. After hearing before the clerk, an order was entered finding that the note was not in default and denying plaintiff's motion for order of foreclosure. Plaintiff appealed to the superior court. Following the hearing, the judge entered an order finding the facts as above recited and also finding that the \$30,000 payment was made as consideration for the execu-

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tion of the subordination agreement by the noteholders. The court further concluded that the \$30,000 payment did not alter the provisions of the note requiring the payment of \$3,700 plus interest on 27 May 1979. Upon the further finding that the note was in default, the court granted plaintiff's motion to foreclose the deed of trust. From this order, defendants appeal.

Brock, Begley & Drye, by Michael W. Drye, for plaintiff appellee.

Swain & Stevenson, by Joel B. Stevenson, for defendant appellants.

MARTIN (Harry C.), Judge.

Defendants make one argument on appeal, that the court erred in signing and entering the order of foreclosure. Defendants did not make any exceptions to the findings of fact or conclusions of law made by the court in its order. Therefore, the findings of fact are deemed to be (and are in fact) supported by substantial competent evidence and are conclusive upon appeal. *Schloss v Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962); *In re Vinson*, 42 N.C. App. 28, 255 S.E.2d 644 (1979). The findings of fact support the conclusions of law and the entry of the order allowing foreclosure. *See In re Enoch*, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

Defendants argue that *Adams v. Taylor*, 253 N.C. 411, 117 S.E.2d 27 (1960), controls this appeal. In *Adams*, part of the land subject to a deed of trust was condemned for highway purposes and some of the proceeds of the judgment were paid to the creditor. The debtor contended that he was not obligated to make any monthly payments until the proceeds of the judgment had been consumed by applying them as monthly payments under the terms of the note and deed of trust. The Court agreed and held:

The payment made by the Highway Commission was not a payment voluntarily made by the debtor. The taking of the land was over the protest of debtor and creditor. Compensation for the taking was enforced by judicial proceeding. Since the payment was not voluntary, the debtor had no right to direct how it should be used, nor did the creditor have that right. . . . Since neither debtor nor creditor had a right to direct the manner in which the payment should be used, it became the duty of the court to

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direct application so as to accord with "intrinsic justice or the equity of the case."

Id. at 413, 117 S.E.2d at 28-29 (citations omitted).

The distinction between *Adams* and the present case is that here defendants made the \$30,000 payment voluntarily as consideration for the execution of the subordination agreement, which was essential to defendants' development of the property. The rationale of *Adams* is not applicable to the facts of this case, as equity and justice would not require the noteholders to wait years before receiving the final \$7,000 payment where they had allowed their security for the debt to be drastically impaired for the benefit of defendants.

"[I]f neither debtor nor creditor applies payment, it will be applied to unsecured or most precariously secured debt, or according to intrinsic justice or the equity of the case." *Power Co. v. Clay County*, 213 N.C. 698, 709, 197 S.E. 603, 610 (1938). Here, neither party directed application of the \$30,000, but it is apparent from the record that their intent was to reduce the most precariously secured portion of the debt, that which was due furthest in the future. The contemporaneous agreement that defendants would pay the balance on 15 March 1979 supports the noteholders' expectation that they would be repaid fully within the current year.

The trial court in effect found that the \$30,000 payment was not a mere prepayment of installments of the indebtedness, but was given as consideration for the subordination agreement. The conclusion of the court that defendants were obligated to make the 27 May 1979 payment is supported by findings of fact. The order allowing foreclosure is

Affirmed.

Judges WEBB and WHICHARD concur.

State v. Gamble

STATE OF NORTH CAROLINA v. ROMEO GAMBLE

No. 8014SC886

(Filed 17 February 1981)

1. Criminal Law § 143.1— notice of probation revocation hearing

Defendant was given sufficient written notice of his probation revocation hearing where defendant was served with an arrest order which alleged that defendant failed to comply with the probation judgment in an action charging false pretenses, and defendant signed a waiver of counsel form ten days prior to the hearing which acknowledged that he had been informed of the charges against him.

2. Criminal Law § 143.4— probation revocation hearing — prior waiver of counsel — failure to ascertain waiver at time of hearing

The trial court did not err in failing to ascertain at the time of a probation revocation hearing whether defendant knowingly and intelligently waived his right to counsel where defendant had executed a written waiver of counsel ten days prior to the hearing, and there was no indication at the hearing that defendant desired to withdraw his waiver of counsel.

3. Criminal Law § 143.2— probation revocation hearing — right to remain silent

The trial court at a probation revocation hearing was not required to inform a defendant who was unrepresented by counsel of his constitutional right to remain silent at the hearing.

4. Criminal Law § 143.5— probation revocation hearing — probation violation report — no denial of cross-examination

Defendant was not denied his right of cross-examination at a probation revocation hearing because the State read the probation violation report into the record and presented no witnesses against defendant where defendant failed to request that he be allowed to examine his probation officer or anyone else.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 17 July 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 February 1981.

On 8 March 1978 defendant pleaded guilty to attempting to obtain property by false pretense and was sentenced to three years imprisonment. This sentence was suspended and defendant was placed on probation for three years under the usual terms and conditions of probation and under the special condition that he pay the costs and a fine of \$200 under the supervision of his probation officer.

A violation report was filed against defendant dated 11 June

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1980. The report alleged that defendant was in arrears in the amount of \$181 on his "court debt," and that he had failed and refused to report to his probation officer as ordered. An order for arrest for this violation, also dated 11 June 1980, was issued against defendant. The order was executed on 4 July 1980.

At the probation revocation hearing on 17 July 1980 the State read the probation violation report into the record. Defendant then testified in his own behalf. The trial court found that defendant had willfully violated the conditions of probation and ordered that the suspension of his three year sentence be revoked. Defendant appeals from a judgment revoking his probation and ordering imprisonment.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Archbell & Cotter, by William J. Cotter and James B. Archbell, for defendant-appellant.

WHICHARD, Judge.

Despite defendant's failure to cite pertinent assignments of error and exceptions immediately following the questions in his brief as required by App. R. 28(b)(3), it appears that he has preserved four of the seven assignments of error set forth in the record.

[1] Defendant first assigns error to the failure of the State to provide him with written notice of the revocation hearing pursuant to G.S. 15A-1345(e). He contends that this failure was a violation of his due process rights. G.S. 15A-1345(e) provides, in pertinent part: "The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing." The record on appeal contains no evidence that the violation report was served on defendant. It does, however, contain evidence that the order for arrest was executed 13 days prior to the hearing. In *State v. Baines*, 40 N.C.App. 545, 253 S.E.2d 300 (1979), this Court held that an order for arrest served on the defendant there "constituted sufficient notice in writing of his probation revocation hearing in apt time to afford him a reasonable opportunity to be heard." *Baines*, 40 N.C.App. at 551, 253 S.E.2d at 304. The order for arrest in *Baines* read: "The defendant named above having failed to comply with the terms and conditions of the

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probation judgment in an actions (sic) charging breaking and entering and larceny YOU ARE DIRECTED TO ARREST THE DEFENDANT . . ." *Baines*, 40 N.C.App. at 550, 253 S.E.2d at 303. The defendant here was served with an arrest order which read: "The defendant named above failed and refused to comply with the Probation Judgment of this Court in action charging False Pretenses." The language of the arrest order here is essentially the same as that in the arrest order in *Baines*, and we find the holding in *Baines* dispositive of the issue raised here. In addition, ten days prior to the hearing defendant here signed a waiver of counsel form which acknowledged that he had been informed of the charges against him. We therefore overrule this assignment of error.

[2] Defendant also assigns error to the failure of the trial court at the time of the hearing to ascertain whether or not he knowingly and intelligently waived his right to counsel. On 7 July 1980, ten days prior to the hearing, defendant executed the following written waiver:

WAIVER OF RIGHT TO HAVE ASSIGNED COUNSEL

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

s/ ROMEO GAMBLE

Sworn to and subscribed before me this 7 day of July 1980.

s/ Sue Clayton

Clerk of Superior Court

CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in

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this case; that he has elected in open Court to be tried in this case without the assignment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This the 7th day of July, 1980.

s/ D.M. McLELLAND

Signature of Judge

In *State v. Watson*, 21 N.C.App. 374, 204 S.E.2d 537 (1974), the defendant executed a similar waiver prior to his district court trial. He then appealed to superior court and was convicted. This Court held:

The waiver in writing once given [is] good and sufficient until the proceeding [including both the district and superior court trials] finally terminate[s], unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant.

Watson, 21 N.C.App. at 379, 204 S.E.2d at 540 (1974). There was no indication that defendant here desired to withdraw his waiver of counsel. In fact, at the hearing, the court asked defendant if he was represented by counsel. He responded, "No, I don't think I need no lawyer. I just wanted to tell my part." This assignment of error is overruled.

[3] Defendant further assigns error to the failure of the court to inform him of his constitutional right to remain silent at the revocation hearing. He argues that when a defendant is unrepresented by counsel and "the State presents no evidence" of the probation violation, the court has an obligation to inform defendant of this right; and that when the court failed to inform him and then proceeded to question him about the alleged violation he was "compelled to be a witness against himself."

Defendant's allegation that the State presented no evidence is erroneous, because introduction of the sworn probation violation report constituted competent evidence sufficient to support the order revoking his probation. *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967). Further, the court was under no obligation to inform defendant of his right to remain silent because he had

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voluntarily waived his right to counsel. "A defendant appearing *pro se* by his own choice does so at his peril and does not automatically become a ward of the court." *State v. McDougald*, 18 N.C.App. 407, 410, 197 S.E.2d 11, 13 (1973). "The court is not required to represent a defendant who chooses to be his own counsel, but, rather, a trial judge sits as an impartial arbiter to see that justice is done between the accused on the one hand and society on the other." *McDougald*, 18 N.C.App. at 410, 197 S.E.2d at 13. We find no merit in this assignment of error.

[4] Defendant finally contends he was denied the right of cross-examination of adverse witnesses, because the State merely read the probation violation report into the record. The State presented no witnesses against the defendant, and defendant failed to request that he be allowed to examine his probation officer or anyone else. In *Duncan*, the North Carolina Supreme Court overruled an assignment of error based on identical facts, stating that the record failed to support defendant's contention. 270 N.C. 241, 154 S.E.2d 53 (1967). We thus overrule defendant's assignment of error here.

The judgment finding that defendant failed to comply with the terms and conditions of probation, revoking the prior suspension of sentence, and ordering imprisonment of the defendant is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

WACHOVIA BANK AND TRUST COMPANY, N.C., EXECUTOR AND TRUSTEE
UNDER THE WILL OF WILLIAM ELMO BAKER V. MIKE RUBISH

No. 8014DC571

(Filed 17 February 1981)

Landlord and Tenant § 14— holding over after expiration of lease — jury question

In an action for summary ejection, defendant's averments that the lease had been renewed for an additional term, and the subsequent evidence presented by defendant in support of that contention, established a question of fact for the jury as to whether defendant was holding over after the expiration of the lease term; moreover, plaintiff was not entitled to a directed verdict or judgment n.o.v. on either of defendant's claims of waiver of formal renewal by plaintiff or estoppel, since defendant presented evidence that, even though plaintiff found no formal

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renewal notices from defendant among deceased landlord's business papers, plaintiff never advised defendant that he must provide written notice of his intention to renew the lease for another term; defendant's evidence tended to show that he had a continuing relationship of several years with plaintiff through the loan department, and extensive negotiations concerning the lease with the plaintiff's employees in the trust department; defendant presented evidence that the useful life of his improvements to the property was forty years and that improvements were made within the period for renewal of the lease; and defendant was not disqualified from relying on the equitable defenses of waiver and estoppel because of his attempt to use a fabricated letter as evidence of compliance with the express terms of the lease agreement, as defendant withdrew both the defense and the letter prior to trial and apologized to the court for his misconduct.

APPEAL by plaintiff from *LaBarre, Judge*. Judgment filed 14 January 1980 in District Court, DURHAM County. Heard in the Court of Appeals 8 January 1981.

Plaintiff, Wachovia Bank and Trust Company, as Trustee and Executor under the will of William Elmo Baker, instituted this action in summary ejectment against the defendant, Mike Rubish. The case was removed to District Court pursuant to agreement between the parties. Plaintiff's complaint alleges that a lease between defendant and William Baker for the disputed property expired on 30 April 1979 and defendant's failure to provide plaintiff with written notice of his intention to renew the lease not later than ninety days prior to the expiration of the term, on 30 April 1979, as provided in the lease agreement, entitles plaintiff to immediate possession under the terms of Baker's will.

Defendant specifically denied plaintiff's interests in the property and generally denied the allegations in the complaint. Defendant further affirmatively pled written notice of his intention to renew the lease to Kathleen Baker, waiver of the requirement for written notice by the Bakers, failure of plaintiff to comply with the terms of the lease, and equitable estoppel against the plaintiff. Prior to trial, defendant filed a notice of abandonment and withdrawal of the defense concerning written notice to Kathleen Baker.

Plaintiff's evidence tended to show that the lease expressly required written notice of defendant's intention to renew the lease prior to ninety days before the end of the present term. The plaintiff's witnesses testified that at no time did the plaintiff Bank receive any notification, either written or oral, that defendant intended to renew the lease for a third five year period.

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Defendant's evidence tended to show that he understood the lease was a forty year lease and that it did not require formal renewal even though he was aware of the renewal provisions in the written document. The evidence for defendant further tended to show that following William Baker's death there were extensive negotiations between defendant and plaintiff concerning the sale of defendant's interests in the leased property to the Bank. Defendant received notice to vacate the leased premises on 10 May 1979, but refused to vacate and plaintiff filed this action. The jury found for defendant, from which plaintiff appeals.

Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Robert B. Glenn, Jr., for plaintiff appellant.

Claude V. Jones for defendant appellee.

ARNOLD, Judge.

The trial judge acted in accordance with the law when he denied plaintiff's motions for a directed verdict and judgment notwithstanding the verdict. In an ejectment action, plaintiff must establish the landlord-tenant relationship between plaintiff and defendant, and that defendant is holding over after the expiration of the term set out in the lease. N.C.G.S. 42-26(1). Defendant's averments that the lease had been renewed for an additional term, and the subsequent evidence presented by defendant in support of that contention, established a question of fact for the jury as to whether defendant was holding over after the expiration of the lease term. *See, Poindexter v. Call*, 182 N.C. 366, 109 S.E. 26 (1921). Moreover, defendant presented evidence that plaintiff accepted defendant's implied renewal during negotiations concerning the value and purchase of defendant's interest in the lease.

Plaintiff was not entitled to a directed verdict or judgment n.o.v. on either of defendant's claims of waiver of formal renewal by the plaintiff or estoppel. Whether a landlord has waived provisions in the lease agreement regarding the manner of renewal of the lease for another term is a question of fact to be decided by the jury, as is the application of the doctrine of estoppel. *See, Treadwell v. Goodwin*, 14 N.C. App. 685, 189 S.E. 2d 643 (1972). Defendant presented evidence that even though the Bank found no formal renewal notices from defendant among Baker's business papers, plaintiff never advised defendant that he must provide written notice of his inten-

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tion to renew the lease for another term. Defendant's evidence tended to show defendant had a continuing relationship of several years with the plaintiff through the Loan Department, and extensive negotiations concerning the lease with the plaintiff's employees in the Trust Department. Defendant presented evidence that the useful life of his improvements to the property was forty years and that improvements were made within the period for renewal of the lease. We hold that the evidence was not insufficient as a matter of law on defendant's defenses of waiver and estoppel.

Plaintiff urges this Court to hold that defendant was disqualified from relying on the equitable defenses of waiver and estoppel because of his attempt to use a fabricated letter as evidence of compliance with the express terms of the lease agreement. We decline. The defendant withdrew both the defense and the letter prior to trial and apologized to the court for his misconduct. While we do not condone the activities of defendant in regard to the letter, neither will we use the "clean hands doctrine" to benefit plaintiff in this matter. The doctrine that the courts will not lend their aid to those who come into court with "unclean hands" is to protect the integrity of the courts, not to benefit the opposing party. *See, generally*, 30 C.J.S., Equity § 93 (1965).

Plaintiff's request for a new trial is denied. We find no error in the judge's charge concerning the legal elements of waiver or regarding the contentions of the parties. Nor do we find that the trial judge unduly prejudiced plaintiff's case by referring to plaintiff as "Bank" in the course of his instructions to the jury. Further, the testimony of Jerry Rucker concerning defendant's long-term dealings with plaintiff's Loan Department, while obviously prejudicial to plaintiff's case was not error. The testimony was relevant to the kind of relationship which existed between plaintiff and defendant.

For the reasons discussed, we find no prejudicial error in the trial.

No error.

Judges WELLS and HILL concur.

State v. Commedo

STATE OF NORTH CAROLINA v. PATRICIA COMMEDO AND JANICE HAMMOND

No. 8026SC911

(Filed 17 February 1981)

Criminal Law § 113.7— charge on acting in concert

It is not necessary for a defendant to perform some act which forms an element of the crime charged in order to be guilty of acting in concert, and the trial court in an armed robbery case properly instructed the jury on acting in concert where the evidence tended to show that the two defendants discussed and planned together how they would lure the victim inside a house for the purpose of assaulting and robbing him; the first defendant invited the victim into the house and requested that he be seated; the victim sat with his back to the door and the first defendant sat opposite him to divert his attention from the door; a few seconds later the second defendant, completely disguised, entered and assaulted the victim with a shotgun and took his money; and defendants then carried out their planned charade of treating the first defendant as a victim of the robbery.

APPEAL by defendants from *Gaines, Judge*. Judgments entered 1 May 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1981.

Defendants were charged with and convicted of armed robbery. They appeal from sentences of imprisonment. Evidence necessary for resolution of the appeal is contained in the opinion of the Court.

Attorney General Edmisten, by Associate Attorney Thomas G. Meacham, Jr., for the State.

Cherie Cox, Assistant Public Defender, Twenty-Sixth Judicial District, for defendant appellants.

MARTIN (Harry C.), Judge.

Defendants urge one question on appeal, that the trial court erred in failing to instruct the jury on the principle of aiding and abetting and in charging upon acting in concert instead. A written request to so charge was filed by defendants and refused by the trial judge. Defendants do not contend that the charge on acting in concert was defective, but only that it was not appropriate under the facts of this case. Defendants insist they were entitled to instructions on acting in concert *and* aiding and abetting. They argue that defendant Hammond did not commit any act that forms a part of the offense charged.

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The evidence pertinent to this issue is:

David Lee Coxton testified:

After she called me and said Janice wanted to see me, Patricia Commedo or Commodore went to the house, in the house Janice was staying in. I then walked on down to see what Janice wanted

When I got down to Janice's house, Janice took me into the back room She asked me to make the phone call for her. She wanted me to call Ray's for her. She wanted to get a check cashed

. . . I called Ray's, and I told them Jackie needed to get a check cashed and could they send a man out.

. . . .

. . . I went down there and told Janice that the man was coming.

Stanley Dale Caldwell testified:

Janice said she needed some money. Commodore said that she needed some money

. . . .

. . . [W]hile Janice Hammonds and Patricia Commodore were there with me in the living room, Janice told me that Ray Furniture Company was supposed to be coming to the house and said that when he knocked on the door, she was going to let him in and Commodore was supposed to come out of the back room with a shotgun. Janice was supposed to pretend she doesn't know what's going on.

Loretta Hammond, defendant Hammond's sister, testified:

I heard the whole thing that was said between Patricia Commodore and Janice Hammonds. I heard them talking about they were going to rob Ray's [T]hey were going to rob Ray's Furniture Company. They were going to tell him that somebody had a check and for somebody to come and cash the check and Commodore was going to be standing in front of the house and give the man a

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chance to get inside the house and come from behind him and hit him.

Kenneth B. Kirkpatrick, the prosecuting witness, testified:

I went to 4348 Humphrey Street around noon. I have been to that address three or four times previously. Loretta Hammond and Jacqueline Hammond live there. They have an account with Ray's Furniture Company. I have been to that address before.

... Janice Hammond answered the door and invited me inside and requested that I have a seat. I was familiar with Janice Hammond because once or twice she had been in the home when I had cashed checks for her two sisters

... At that time I had a seat sitting close to the door. I was in the living room. Janice Hammond crossed the room and was seated on the couch. Approximately thirty seconds to a minute later after I had entered the house, someone entered the front door and struck me twice. The person who entered the front door had on green Army fatigues, combat boots, stocking mask, a white, knit type toboggan over their head.

Defendants contend that the evidence does not show that Hammond performed any act which forms an element of the criminal offense, and therefore it was error to charge on acting in concert. They rely upon *State v. Robinette*, 33 N.C. App. 42, 234 S.E.2d 28 (1977). The reliance on *Robinette* is misplaced. Justice Carlton laid the matter to rest in *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980), saying:

Furthermore, the jury in this case was properly charged on the issue of acting in concert. Defendant's contention that it is necessary to perform *some act* which forms an *element* of the crime charged in order to be guilty of acting in concert is erroneous. Such has never been the law in this State.

Id. at 656, 234 S.E.2d at 777 (emphasis in original).

Justice Exum in *State v. Joyner*, 297 N.C. 349, 356-57, 255 S.E.2d 390, 395 (1979), stated:

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The principle of concerted action need not be overlaid with technicalities. It is based on the common meaning of the phrase "concerted action" or "acting in concert." To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose. See definitions of "concert," Webster's Third New International Dictionary 470 (1971). These terms mean the same in the law of crimes as they do in ordinary parlance.

Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

In the case before us, the evidence is plenary that defendants were acting together pursuant to a common plan and purpose to rob the prosecuting witness. They discussed and planned together how they would lure their victim inside the house for the purpose of assaulting and robbing him. Hammond invited the victim into the house and requested that he be seated. He sat with his back to the door, with defendant Hammond seated opposite him to divert his attention from the door. Only a few seconds later, Commedo entered, completely disguised, and assaulted the victim with a shotgun, taking his money. Then, defendants carried out their planned charade of treating Hammond as a victim. From this evidence the jury could find that both defendants were equally guilty of the crime committed by Commedo pursuant to their common plan and purpose to commit armed robbery. The assignment of error is over-

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ruled.

No error.

Judges WEBB and WHICHARD concur.

BOARD OF TRANSPORTATION v. JASPER C. CHEWNING AND WIFE, HAZEL ELIZABETH CHEWNING

No. 8020SC599

(Filed 17 February 1981)

Eminent Domain §§ 6.5, 6.9— value of property taken — cross-examination of witness improper

In a condemnation proceeding in which the sole issue at trial was the amount due defendants as compensation for the taking of their real property by plaintiff, the trial court erred in permitting plaintiff to cross-examine defendants' value witness concerning his purchase of property in the vicinity several years before, since there was no showing that the property purchased by the witness was in any way comparable to defendants' property, and there was thus no foundation for use of the witness's statement of its sales price as competent circumstantial evidence of the value of defendants' land; moreover, defendants were prejudiced where the trial court did not instruct the jury that they should not consider the testimony of the value witness as substantive evidence or that they should consider it only insofar as it tended to reflect upon the witness's credibility or knowledge of property values in the area.

APPEAL by defendants from *Seay, Judge*. Judgment entered 31 January 1980 in Superior Court, ANSON County. Heard in the Court of Appeals 13 January 1981.

This is a condemnation proceeding in which the sole issue at trial was the amount due the defendants as compensation for the taking of their real property by the Department of Transportation, pursuant to the provisions of Chapter 136 of the General Statutes. The complaint, declaration of taking and notice of deposit were filed 3 May 1976.

The pleadings and evidence showed the following: Defendants were the owners of a 2.85-acre parcel of real property, having a 370-foot frontage on U.S. Highway #74 in Anson County. Situated on the land was a one-story frame building containing a residential area and a grocery store. A large parking lot was located in front of the building. The Board of Transportation condemned 1.85 acres of

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defendants' 2.85-acre tract, including the parking lot, residence and business, for use in the construction of State Highway Project 8.1609701 in Anson County.

Defendants offered opinion testimony of the fair market value of their property ranging from \$85,000 to \$125,000. Plaintiff's evidence as to fair market value varied from \$29,450 to \$31,775.

Defendants appeal from a jury verdict of \$38,100.00, assigning error.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey and Associate Attorney Evelyn M. Coman, for the plaintiff-appellee.

Taylor and Bower by H. P. Taylor, Jr., for the defendants-appellants.

MARTIN (Robert M.), Judge.

Defendants present six assignments of error for review on this appeal, based on twenty-eight exceptions in the record. In determining the outcome of this appeal, however, we need only address one of these exceptions, which involves prejudicial error entitling defendants to a new trial.

During the presentation of their case, defendants called J. B. Watson to testify as to his opinion of the fair market value of the tract in question. Mr. Watson testified that he was a certified public accountant and that he had been a party to approximately forty different real estate transactions in Anson County. Mr. Watson also testified that he was familiar with real estate values in Anson County and with the property in question. He testified that in his opinion, the fair market value of the 1.85-acre tract in question was \$100,000.

On cross-examination, Mr. Watson testified that he had purchased approximately three-fourths of an acre of property "out there" in 1974. Mr. Watson did not know how much road frontage the property had on U.S. Highway #74. He was then asked "[w]hat did you pay for it?" After the court overruled defendants' objection to this question, Mr. Watson replied, "[s]eventy-five hundred."

As there was no showing that the property referred to in the testimony summarized above was in any way comparable to defend-

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ants' property, there was no foundation for the use of the witness's statement of its sales price as competent circumstantial evidence of the value of defendants' land. *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980). Plaintiff contends nevertheless that the question was proper on cross-examination for the purpose of impeaching the witness and probing his knowledge of land values in the area. We disagree.

When a witness testifies as to the fair market value of a tract in question, that witness's knowledge, or lack of it, of the values and sales prices of noncomparable properties in the area may be relevant to his credibility and may be explored on cross-examination. *Power Co. v. Winebarger*, *supra*; *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972); *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961); *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959); *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61 (1957). Justice Exum, speaking for our Supreme Court in *Power Co. v. Winebarger*, *supra*, examined prior North Carolina case law and carefully delineated the permissible scope of such cross-examination.

The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit is at best mere surplusage. At worst it represents an attempt by the cross-examiner to convey to the jury information which should be excluded from their consideration.

300 N.C. at 64-65, 265 S.E. 2d at 232.

[W]here a particular property is markedly dissimilar to the property at issue, the sales price of the former may not be introduced or alluded to in any manner which suggests to the jury that it has a bearing on the estimation of the value of the latter.

...

[I]t is improper for the cross-examiner to refer to specific values or prices of noncomparable properties in his questions to the witness. . . . If . . . the witness asserts his knowledge on cross-examination of a particular value or

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sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues. In such a rare case, however, the cross-examiner must be prepared to take the witness' answer as given.

300 N.C. at 66, 265 S.E. 2d at 232-233.

In *Winebarger* the Supreme Court held that the trial court erred in repeatedly allowing witnesses to testify on cross-examination to values and sales prices of noncomparable properties although the trial court instructed the jury to consider such testimony only insofar as it bore upon the witnesses' knowledge of values. While we recognize that the present case involves only one instance of such improper testimony, we believe that this constituted prejudicial error to defendants which entitles them to a new trial. It appears that the plaintiff desired only to get the \$7,500 figure before the jury to induce thereby a conservative award. Its admission may well have influenced the adequacy of the jury's verdict, especially in light of the absence of any limiting instruction to the jury. No instructions were given to the jury in the present case that they should not consider the testimony in question as substantive evidence or that they should consider it only insofar as it tended to reflect upon the witness's credibility or knowledge of property values in the area. In addition, defendants offered the testimony of four value witnesses other than the landowner. The testimony as to value of one of these witnesses was stricken by the court and the testimony of Mr. Watson was made less effective by the improper cross-examination discussed above.

Defendants are entitled to a new trial for failure of the trial judge to confine the nature and scope of the cross-examination of Mr. Watson to matters relevant to its limited impeachment purposes. We do not discuss those assignments of error directed to other rulings of the court in admission or exclusion of evidence as these are not likely to occur at another trial.

New trial.

Judges HEDRICK and CLARK concur.

State v. Davis

STATE OF NORTH CAROLINA v. SHEPARD DAVIS

No. 805SC820

(Filed 17 February 1981)

Robbery § 4.7— armed robbery — insufficiency of evidence

In a prosecution of defendant for armed robbery, evidence was insufficient to be submitted to the jury where it did not place defendant in the store at the time of the robbery; although it placed him in the car stopped by officers and established that the stopped car resembled one seen outside the store immediately after the robbery, it did not show that defendant did anything to give active encouragement to the robbers or to make it known to them that he was either standing by to give them assistance or that he did give such assistance; although on *voir dire* of one of the police officers, the State did bring out the fact that defendant was the registered owner of the car stopped by the officers, this evidence was never presented to the jury; and no direct evidence related the nine one dollar bills discovered in the patrol car where defendant had been sitting to defendant or to the money taken in the robbery.

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 10 January 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 January 1980.

Defendant was charged in a proper bill of indictment with armed robbery. Upon defendant's plea of not guilty, he was tried before a jury and found guilty of armed robbery. From a sentence imposing fifteen to thirty years imprisonment, defendant appeals.

At trial the State offered evidence tending to show that Jimmy R. Chappell was employed as a store clerk at the Seven-Eleven store on Princess Place Drive in Wilmington in the early morning of 15 September 1979. Chappell testified that shortly after 5:00 a.m. on 15 September, two black males entered the store. One of the men was short, thin, between twenty-five and thirty years of age and wore gray sweat pants, a green windbreaker, white sweat socks, white tennis shoes and a "golfer type cap." Another black male was of medium build, about five feet ten inches tall, weighing about 180 pounds, and was wearing a white shirt and a dark hat with a brim all around it. While the larger man stood behind Chappell, the smaller man approached the counter, pointed a small handgun at Chappell, and stated "this is a hold-up." The smaller man took approximately \$70.00, consisting mostly of one dollar bills, from Chappell and left the store accompanied by the other black male. Before he called the police, Chappell noticed a large, light colored

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car with a dark vinyl top drive slowly past the store. There were no other cars on the street in front of the store at that time.

Responding to Chappell's call, a police officer observed a large, light colored car moving at a high rate of speed and coming off Princess Place Drive from the direction of the Seven-Eleven store. Soon thereafter, police officers stopped a large, light colored car that contained three black males. Defendant was in the back seat of the car. As the officers approached the car, the passenger in the front seat jumped out of the car and ran. Although this passenger eluded attempts to catch him, the officers observed that he was a short, slender black male wearing gray sweat pants and a green warm-up jacket. In the wake of this man's escape, next to the car on the ground, the officers found a golfer's type hat. The police officers handcuffed defendant and the driver of the car, Edell Hinson, and placed them in the back seat of their patrol car. Both defendant and Hinson were approximately five feet eleven inches tall and weighed 180 pounds. Defendant was wearing a floppy hat with a brim. While in the patrol car, defendant told the officers that he did not have any money. After transporting defendant to the police station, officers found nine one dollar bills wadded up in the back seat where defendant had been sitting. Although defendant and Hinson were presented to Chappell soon after the robbery, Chappell was unable to identify either as one of the robbers.

At the close of the State's evidence, defendant's motion to dismiss was denied. Defendant offered no evidence.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., and Assistant Attorney General Christopher P. Brewer, for the State.

M. Anderson Howell for defendant appellant.

WELLS, Judge.

Defendant first assigns error to the failure of the trial court to grant defendant's motion to dismiss at the conclusion of the State's evidence. We believe that the decision of our Supreme Court in *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967), is applicable here and compels reversal. In *Aycoth*, the Court stated that:

"The mere presence of a person at the scene of a crime at the time of its commission does not make him a princi-

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pal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation." [Citations omitted.]

"All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime To render one who does not actually participate in the commission of crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary." [Citations omitted.]

State v. Aycoth, supra, at 50-51, 157 S.E. 2d at 657. See also *State v. Ross*, 44 N.C. App. 323, 260 S.E. 2d 777 (1979).

In the case *sub judice*, the State's evidence does not place the defendant in the store at the time of the robbery. Although it places him in the car stopped by the officers and establishes that the stopped car resembled one seen outside the store immediately after the robbery, it does not show that defendant was doing anything to give active encouragement to the robbers or to make it known to them that he was either standing by to give them assistance or that he did give such assistance. Although on *voir dire* examination of one of the police officers, the State did bring out the fact that defendant was the registered owner of the car stopped by the officers, this evidence was never presented to the jury. No direct evidence relates the nine one dollar bills discovered in the patrol car where defendant had been sitting to defendant or to the money taken in the robbery.

While there is circumstantial evidence from which a reasonable inference might be drawn that defendant was present at the scene of the crime, the State's evidence does no more than establish

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his "mere presence." *Aycoth v. State, supra*. The State's evidence is sufficient only to raise a suspicion or conjecture as to the defendant's participation in the robbery, and this is not sufficient to withstand defendant's motion to dismiss. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980). The trial court erred in failing to grant defendant's motion to dismiss at the conclusion of the State's evidence.

Reversed.

Judges ARNOLD and HILL concur.

SANDRA HINES WEBB v. SONNY BOY WEBB

No. 802DC601

(Filed 17 February 1981)

Appeal and Error § 16.1— appeal of child visitation order — motion to modify order and hold defendant in contempt — no jurisdiction in trial court

Where defendant appealed an order with respect to child visitation privileges, the trial court was without jurisdiction pending the appeal to entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt for failure to comply with the order appealed from and seeking to have the order modified.

APPEAL by defendant from *Manning, Judge*. Order filed 18 January 1980 in District Court, BEAUFORT County. Heard in the Court of Appeals 13 January 1981.

This is an appeal from an order of the district court adjudging defendant in contempt of an order of the district court entered 25 June 1979. The record discloses that on 25 June 1979, the court entered an order with respect to visitation privileges for defendant as to the children born of his marriage to plaintiff. From this order, plaintiff on 25 June 1979 gave notice of appeal to the Court of Appeals.

In a motion in the cause verified on 6 November 1979, plaintiff sought that defendant "be required to show cause why he should not be adjudged in contempt for his violation of the Court Order dated the 25th day of June, 1979," and that defendant's visitation privileges be "amended." On 18 December 1979, the matter apparently

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came on for hearing on plaintiff's motion before Judge Manning. The record indicates that on 18 January 1980, plaintiff filed a "Withdrawal of Appeal" from the 25 June 1979 order. The record contains an undated, unsigned order adjudging defendant to be in contempt and modifying defendant's visitation privileges. This judgment was filed 18 January 1980. The record further indicates that defendant gave notice of appeal in open court from this judgment and thereafter, on 29 January 1980, defendant gave written notice of appeal from the unsigned judgment apparently filed on 18 January 1980. The record also contains an order dated 7 March 1980 wherein the court, finding "that there may be ambiguity as to the Defendant's appeal rights," ordered that the time for filing notice of appeal in the case be extended through 30 January 1980.

Stephen A. Graves for the plaintiff appellee.

No counsel for the defendant appellant.

HEDRICK, Judge.

G.S. § 1-294 in pertinent part provides:

When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

An appeal in the domestic action removes the cause to the appellate court and the trial court is *functus officio* until the validity of the judgment is determined; thus, the trial court is without jurisdiction, pending the appeal, to punish the husband in contempt for failing to comply with the judgment appealed from and its findings and order to that effect are void. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962); accord, *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973); *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972). The trial court is likewise without jurisdiction to proceed upon the very matters which were embraced in and which were directly affected by the order from which the appeal is taken. *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

Although the record in the case before us is unclear in many respects, it is manifest that Judge Manning was *functus officio* to

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entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt and seeking to have the 25 June 1979 order modified. Obviously, the purported "Withdrawal of Appeal" was made subsequent to any notice to defendant of a hearing on the motion in the cause, and was apparently contemporaneous with the 18 January 1980 filing of the unsigned and undated judgment. We are aware of the fact of the recital in the unsigned and undated judgment filed 18 January 1980 that plaintiff's appeal from the 25 June 1979 order had been withdrawn and the appeal was ineffectual and that the court had jurisdiction; however, there is nothing in this record to support such a recital or to indicate that defendant agreed in any way that the court had jurisdiction to hear plaintiff's motion, amend the former order, or adjudge defendant in contempt. Indeed, defendant's first assignment of error challenges the jurisdiction of the trial court to entertain plaintiff's motion and to enter any order thereon.

In our opinion, all proceedings in the matter were stayed by plaintiff's appeal from the 25 June 1979 order. G.S. § 1-294; *Joyner v. Joyner, supra*; *Carpenter v. Carpenter, supra*.

The order filed 18 January 1980 is

Vacated.

Judges MARTIN (Robert M.) and CLARK concur.

STATE OF NORTH CAROLINA v. JACK REX JARVIS

No. 801SC782

(Filed 17 February 1981)

Criminal Law § 4—solicitation to commit crime — no felony — no jurisdiction in superior court

The superior court did not err in dismissing an indictment against defendant for lack of subject matter jurisdiction where the indictment alleged that defendant solicited three others to possess and deliver more than one ounce of marijuana, which was not in itself an infamous offense, and the indictment did not charge elements of secrecy, deceit and intent to defraud.

APPEAL by the State from *Brown, Judge*. Order entered 10 June 1980 in Superior Court, CURRITUCK County. Heard in the

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Court of Appeals 8 January 1981.

The indictment charged that the defendant "unlawfully and willfully did feloniously, infamously, intentionally, and with malice, entice, advise, incite and solicit Mary Carper, Richard Carper, and Cindy Rodgers to unlawfully, willfully, and feloniously commit a felonious criminal offense, to wit: to unlawfully, willfully, and feloniously possess and deliver more than one ounce of marijuana, a controlled substance listed in Schedule VI of the North Carolina Controlled Substances Act, to Donna Thornhill's residence, with the specific intent that such felonious criminal act be committed in violation of the common law." In a separate count, defendant was charged with violation of N.C.G.S. 14-230 for failing to arrest the above named individuals for misdemeanor possession of marijuana in his presence.

At the close of the State's evidence, defendant made a motion for directed verdict which the trial judge denied. But the judge, *sua sponte*, dismissed the indictment for lack of subject matter jurisdiction.

The State appeals.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Twiford, Trimpi, Thompson & Derrick, by Russell E. Twiford, John G. Trimpi and Jack H. Derrick, for defendant appellee.

ARNOLD, Judge.

The State challenges the trial judge's ruling that the Superior Court of Currituck County is without jurisdiction to try this case. It is conceded that the second count of the indictment, failure to discharge an official duty in violation of N.C.G.S. 14-230, is a misdemeanor and would normally be tried in the District Court of Currituck County, but the State argues that the solicitation to possess and deliver more than one ounce of marijuana count constitutes a felony and is properly within the jurisdiction of the Superior Court. Further, under N.C.G.S. 15A-926(a) the State would join the misdemeanor for trial with the felony in Superior Court.

Solicitation to commit a felony, at common law, was a misdemeanor. Perkins, Criminal Law 506 (1957). However, N.C.G.S. 14-3(b) states: "If a misdemeanor offense . . . be infamous, done in

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secrecy and malice, or with deceit and intent to defraud, the offender shall, . . . be guilty of a felony . . .” Notwithstanding this statute and reported cases, as we have before noted, there is uncertainty concerning what crimes are considered “infamous.” *See, State v. Keen*, 25 N.C. App. 567, 214 S.E. 2d 242 (1975); 28 N.C.L. Rev. 103 (1949).

The State argues that defendant’s scheme to solicit others to place marijuana in the home of Ms. Thornhill so that defendant subsequently could discover it and arrest Ms. Thornhill shows cold, calculated malice and is an infamous act. Furthermore, the State says, the concealment of the marijuana in Ms. Thornhill’s home, of necessity, would have been done in secrecy, and would have amounted to a deceitful and fraudulent crime, a felony, under G.S. 14-3(b).

Unquestionably the State’s position is sound and convincing when the State’s evidence is considered. However, it is not what the evidence shows that we must review. It is the indictment. Are the elements of a felony alleged in the bill of indictment? If not we must affirm the trial court’s decision that the Superior Court was without jurisdiction.

Defendant here is charged with solicitation. Examination of the indictment reveals that the elements of secrecy, deceit and intent to defraud are not charged. Moreover, we cannot say that solicitation of another to possess and deliver more than one ounce of marijuana is an infamous offense. No felony is alleged in the indictment. The decision of the trial court is

Affirmed.

Judges WELLS and HILL concur.

IN THE MATTER OF MARY LOU FERGUSON

No. 8019DC659

(Filed 17 February 1981)

1. Appeal and Error § 6.9— denial of motion for jury trial — appealability

An interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights affects a substantial right and is immediately appealable. G.S. 1-277(a); Art. I, § 25 of the N. C. Constitution.

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2. Jury § 1; Parent and Child § 1—proceeding to terminate parental rights—no right to jury trial

Respondent mother had no constitutional right to a jury trial in a proceeding to terminate her parental rights.

APPEAL by Ottie Lamb Ferguson, respondent, from *Heafner, Judge*. Order signed 21 February 1980 in District Court, RANDOLPH County. Heard in the Court of Appeals 4 February 1981.

This is a proceeding for the termination of parental rights with respect to the child, Mary Lou Ferguson. Ottie Lamb Ferguson, mother of the child, filed answer denying the material allegations of the petition and requested a jury trial. At the hearing in district court, attorney for Ottie Lamb Ferguson moved for a jury trial on all issues before the court. On this question, counsel raised the constitutionality of N.C.G.S. 7A-289.30 which requires the hearing to be by the district court sitting without a jury.

From the order of the court denying the motion for jury trial, Ottie Lamb Ferguson appeals.

Gavin and Pugh, by W. Ed Gavin, for petitioner, Randolph County Department of Social Services.

Ottway Burton for respondent appellant.

Attorney General Edmisten, by Associate Attorney Lemuel W. Hinton and Assistant Attorney General Henry T. Rosser, for the State, amicus curiae.

MARTIN (Harry C.), Judge.

[1] At the outset, we note that Ottie Lamb Ferguson, mother of the child involved, is a proper party to this proceeding. The order denying her motion for jury trial is interlocutory but does affect a substantial right within the meaning of N.C.G.S. 1-277(a) and is appealable. N.C. Const. art. I, § 25.

[2] The question thus raised is whether the North Carolina constitutional requirement of trial by jury is applicable to a proceeding for termination of parental rights under Article 24B of Chapter 7A of the General Statutes of North Carolina. We are of the opinion and hold that it does not apply.

Rule 38 of the North Carolina Rules of Civil Procedure provides:

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(a) *Right preserved.*—The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

(b) *Demand.*—Any party may demand a trial by jury of any issue triable of right by a jury

N.C. Gen. Stat. 1A-1, Rule 38(a) and (b). Thus it appears that if the issues in this proceeding are triable by a jury as a matter of constitutional or statutory right, respondent was entitled to the granting of her motion for jury trial.

The statute involved does not grant a trial by jury in this proceeding. To the contrary, it requires the proceeding to be heard by the court without a jury.

The question remains, is there a constitutional right to a jury trial in this proceeding? We answer no. Chief Justice Parker, in discussing jury trial under section 19 (now section 25) of article I of the North Carolina Constitution said: "Under this constitutional provision, 'trial by jury is only guaranteed where the prerogative existed at common law or by statute at the time the Constitution was adopted.'" *In re Wallace*, 267 N.C. 204, 207, 147 S.E.2d 922, 923 (1966). *Accord, In re Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33, *cert. denied*, 282 N.C. 426 (1972). The Court in *Railroad v. Parker*, 105 N.C. 246, 248, 11 S.E. 328, 328 (1890), held that it was settled by *Rail Road Company v. Davis*, 19 N.C. 451 (1837) (the Court speaking through the great Chief Justice Ruffin), that the Constitution guarantees the right to jury trial "in controversies respecting property, only in cases where, under the common law, the demand that the facts should be so found could not have been refused." *See* 2 McIntosh, N.C. Practice and Procedure §§ 1431-1433 (2d ed. 1956).

Although counsel do not make a due process argument, we find that the United States Constitution does not require a jury trial as a part of due process. *Insurance Co. v. Glidden Co.*, 284 U.S. 151, 76 L.Ed. 214 (1931); *Wagner Co. v. Lyndon*, 262 U.S. 226, 67 L.Ed. 961 (1923). Also, the seventh amendment of the United States Constitution, guaranteeing jury trials in federal courts, is not applicable to the state courts. *Williams v. Williams*, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Proceedings to terminate parental rights in children were unknown at the common law. Nor did they exist by statute at the

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time of the adoption of our constitution. The statute establishing these proceedings was first adopted by the legislature in 1969. The legislature in adopting this procedure established the policy of having the issues decided by the court without a jury. This was properly the prerogative of the legislature. *Board of Education v. Forrest*, 193 N.C. 519, 137 S.E. 431 (1927).

There was no right to jury trial at common law in proceedings to terminate parental rights, nor by statute at the time our constitution was adopted, and it is not now provided for by the statute. Therefore, we hold appellant's motion for a trial by jury was properly denied.

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. CLAUDIE CLARA DUVALL

No. 801SC821

(Filed 3 March 1981)

1. Automobiles § 131—accessory after the fact to hit and run driving — proof required

In order to convict defendant for being an accessory after the fact to a hit and run accident resulting in injury and death, the State was required to prove (1) that the principal was driving the vehicle involved in an accident resulting in injury to or death of the victim, that the principal so knew, and that he failed to stop his vehicle immediately at the scene; (2) the alleged accessory gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony.

2. Courts § 9.1; Jury § 2.1— motion for special venire denied — subsequent granting of motion by another judge proper

The trial judge did not err in granting the State's motion for a special venire on 4 December 1979 after another judge had denied such a motion on 7 June 1979, since an order granting a special venire was a pretrial interlocutory order, the granting or denial of which was within the trial court's discretion; more than five months had elapsed between the two motions for a special venire, and the State presented additional and current evidence that defendant would not be able to receive a fair and impartial trial before a jury comprised of residents of the county where he was a prominent citizen and where considerable publicity had occurred; and the circumstances thus had changed between the time of the two motions so that the trial judge did not abuse his discretion by hearing and

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granting the renewed motion. Moreover, there was no merit to the contention of defendant, who was charged with being an accessory after the fact to a felony, that the trial court erred in denying his motion that a special venire be called from a county other than Perquimans on the ground that the earlier trial of the principal before jurors of that county, in addition to newspaper coverage of the trials, created prejudicial pretrial publicity.

3. Judges § 5— no bias of judge — disqualification not required

In a prosecution of defendant for being an accessory after the fact to a felony, there was no merit to defendant's contention that he was deprived of a fair trial because the judge was biased against him, as he had presided over the earlier trial of the codefendant principal, where testimony that tended to incriminate the present defendant was heard, and defendant did not show bias of the judge in (1) denying defendant's motion to challenge a juror out of the presence of the other jurors and announcing his decision before the jurors, (2) admonishing defendant, when he embarked upon an irrelevant topic during direct examination, not to volunteer answers, and (3) denying defendant's motion for recess and continuing the trial into the evening hours.

4. Criminal Law § 48— silence of defendant — res gestae — admissibility of evidence

In a prosecution of defendant, a deputy sheriff, for being an accessory after the fact to a felony, defendant's silence at the scene of the alleged crime was relevant in that defendant failed to share his knowledge of facts concerning a crime with a fellow police officer who was investigating that crime; his silence under the circumstances implied his knowledge of or participation in a cover-up; and at the time of his silence, defendant was not under arrest or subject to interrogation.

5. Criminal Law § 88.2— witness's opinion as to defendant's guilt — cross-examination properly limited

In a prosecution of defendant for being an accessory after the fact to hit and run driving, there was no merit to defendant's contention that the trial court should not have sustained the State's objections to questions on cross-examination of the investigating officer because the officer's answers would have shown that he did not suspect defendant's involvement in the alleged cover-up, since the investigating officer's opinion as to defendant's guilt was irrelevant to the issue of whether defendant was actually involved and the question of his guilt or innocence was properly one for the jury.

6. Criminal Law § 89.3— records of investigating officer — prior testimony — no impeachment

There was no merit to defendant's contention that the investigating officer's testimony and portions of his notes from the investigation would have impeached his credibility and that the trial court therefore erred in excluding them during cross-examination, where the investigating officer's testimony that he was not suspicious that a cover-up might be occurring was not inconsistent with his statement that he had no suspects at the time he began investigating, and the officer's notes were not competent, as reports of investigating officers are the

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work product of the prosecution and there is no constitutional right to their examination.

7. Criminal Law § 33— defendant as suspect — evidence properly excluded

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court did not err in denying admission of statements of an SBI agent as to whether defendant was a suspect, and there was no merit to defendant's contention that these statements would have shown that he cooperated in the investigation, thereby negating his involvement in a cover-up, since the answers contained in the record did not support defendant's theory, and defendant's cooperation with investigators on 23 February would not demonstrate that he had not been involved at the time of the alleged cover-up, 19 and 20 February.

8. Criminal Law § 62— defendant's willingness to take polygraph test — evidence properly excluded

In a prosecution of defendant for being an accessory after the fact to hit and run driving, there was no merit to defendant's contention that the trial court should have admitted evidence concerning whether he was willing to take a polygraph test as demonstrative of his cooperation with investigators, since such evidence was irrelevant to defendant's actions at the time of the alleged cover-up, and such testimony would create an inference that defendant took and passed a polygraph test, but polygraph results are not admissible in this State.

9. Criminal Law § 52— improper hypothetical question — expert testimony properly excluded

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court did not err in sustaining the State's objection to a question put to the State's expert witness concerning the height of an automobile's bumper if the brakes were applied, since the hypothetical question was based on facts not in evidence and was therefore improper.

10. Criminal Law § 65— psychiatrist's definition of panic — defendant suffering panic — evidence properly excluded

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court did not err in excluding testimony of defendant's expert psychiatric witness giving his definition of panic and his opinion as to whether defendant suffered panic upon discovery of the accident victim's body, since the general definition of panic is one a layperson would know and understand and no expert testimony was therefore necessary; the record did not indicate that the psychiatrist was treating defendant as a regular patient with a view toward treatment or cure so that the correct form of the question as to whether the psychiatrist was of the opinion that defendant panicked would have been a hypothetical question rather than a direct one; the opinion sought was therefore based upon facts not in evidence and so was properly excluded; defendant sought to introduce the expert testimony to establish that he was confused and not thinking logically upon discovering the body, but diminished capacity is not a defense, nor did defendant attempt to establish a defense of insanity; and defendant himself testified in effect that he had panicked and the substance of the

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proffered expert testimony was therefore before the jury.

11. Criminal Law § 90— witness not declared hostile

The trial court did not err in refusing to declare a defense witness a hostile witness during his redirect examination since the witness's testimony and his answer given outside the presence of the jury did not demonstrate an unwillingness to answer or an interest adverse to defendant's.

12. Criminal Law § 43— photograph of accident victim — admissibility

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court did not err in admitting into evidence a photograph of the accident victim, since the photograph was relevant in establishing the identity of the victim, and the picture was used to illustrate the testimony of a witness.

13. Criminal Law § 101.3— jury view of automobile — propriety

In a prosecution of defendant for being an accessory after the fact to a hit and run accident and for willful failure to discharge official duties as a county deputy sheriff, the trial court did not err in denying defendant's motion to have the jury view the automobile in question at night rather than in daylight, though defendant first observed the car at night, since SBI agents who were testifying examined the vehicle during the day, and any change in the appearance of the automobile was not substantial and defendant had the opportunity to point out any differences.

14. Criminal Law § 77.1— accident report prepared by defendant deputy sheriff — report voluntarily made

In a prosecution of defendant for being an accessory after the fact to a hit and run accident and for willful failure to discharge official duties as a county deputy sheriff, the trial court did not err in denying defendant's motion to suppress the accident report which he submitted to the county sheriff, since defendant, as a deputy sheriff, had a duty to make the report under G.S. 20-166.1(e); defendant's performance of an official duty in the course of his job did not amount to official coercion and did not support his motion to suppress; defendant did not resist or object to making his report; defendant had several days to write the report at the time and place he desired; and defendant showed the document to his attorney before submitting it.

15. Automobiles § 131.2— hit and run driving — instructions proper

In a prosecution of defendant for being an accessory after the fact to hit and run driving, evidence was sufficient to support the trial court's instruction that the jury could find defendant guilty if it should find that defendant directed that dirt be knocked off a post so that it would look like the post had been hit by the car in question.

16. Automobiles § 131.2— hit and run driving — guilty knowledge — instructions sufficient

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court's instructions made it clear that, to establish the necessary guilty knowledge, the State must show that the principal knew that a

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person had been injured or killed in the accident in question.

17. Criminal Law § 142— probation — trial court's exercise of discretion proper

There was no merit to defendant's contention that he should have been placed on probation and that the trial judge failed to exercise his discretion and dismissed the motion for probation summarily, since a full presentencing hearing was held, during which defendant was allowed to present and discuss his views, and the State made no recommendation regarding sentencing.

APPEAL by defendant from *Brown, Judge*. Judgment entered 29 February 1980 in Superior Court, DARE County. Heard in the Court of Appeals 14 January 1981.

Defendant was indicted for being an accessory after the fact to a hit-and-run accident resulting in injury and death, and for willful failure to discharge official duties as a deputy sheriff of Dare County. Defendant pleaded not guilty. Defendant was tried before a special venire of jurors called from Perquimans County.

Evidence for the state tends to show the following:

Cloice Creef, an 87-year-old man, was seen alive about 6:30 p.m. on 19 February 1979 when he left his home on highway 64-264 near Manteo, North Carolina. His body was found in a ditch along that highway the following day. An autopsy revealed that the location, nature, and extent of Creef's injuries indicated he had been struck from behind by a motor vehicle.

Trooper J. W. Bonner of the highway patrol was on duty 20 February 1979. He routinely investigates accidents in Dare County and assists officers from the sheriff's department. On the afternoon of 20 February, deputy sheriff Duvall, defendant in this case, approached Bonner and told him that a body had been found. The two drove in Bonner's patrol car to the scene of the accident. When Bonner asked Duvall what was going on, the latter replied two boys had found a body, adding "Bonner, I know something about what happened. My God, if I had only knew last night." Duvall continued telling Bonner that while he was at Manteo Memorial Clinic, Malcolm and Charles Fearing came in and told him that Charles had had an accident in Malcolm's automobile. Duvall later met the Fearings and all three searched the road for whatever Charles had hit, which Charles thought was a traffic sign. Duvall told Bonner he went home after being unable to find anything.

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While Bonner and Duvall were at the scene of the accident, Charles and Malcolm Fearing drove up. They showed Bonner an old post they thought Charles had struck the night before. Duvall was present but did not say anything else about other events of that evening.

Bonner went to the automobile body shop where the Fearings had left the car after Duvall had told them they could take it. The car had sustained considerable damage to the front end and windshield. Glass particles retrieved from Creef's clothing matched those found at the scene and in the car. Ashes taken from Charles Fearing's fireplace revealed metal fragments which matched the metal in the nails and buckle of the one shoe found on Creef's body.

On 21 February 1979, the sheriff of Dare County asked Duvall to write a report of the accident. Duvall previously had not directly reported anything to the sheriff about the accident. Duvall returned his report on 23 February, after showing it to his attorney. The report was later turned over to the SBI.

After a *voir dire* during trial, the report was read into evidence. It described the Fearings' contacting him at the clinic, his searching of the highway, and his being shown a hat and shoe the Fearings had found. The report stated that the next day while the Fearings were looking for what Charles had hit, they had flagged down Duvall and pointed out the body. Duvall did not stop, but went directly to Charles's house. He asked Charles what he had done with the shoe and Charles replied he had burned it. Duvall told the Fearings no one would believe they had hit a post and told Malcolm to knock dirt off the post they had found. Duvall's report further stated that he then left to find the sheriff, but when he arrived at the office, Keith Fearing, Malcolm's father, had already called to report the finding of the body.

At the close of the state's evidence, defendant's motion to dismiss was denied.

Defendant presented testimony by the two Fearings and others that tended to show that on 19 February 1979, Charles Fearing, his wife, and two friends were riding in Malcolm Fearing's car. Charles was driving. As Charles turned to hand something to a woman who was ill in the back seat, the windshield seemed to explode. The woman became hysterical, and Charles continued

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driving to his home. No one realized they had hit a person; someone suggested they may have struck a sign. Charles picked up Malcolm and they searched unsuccessfully for what had been hit. They drove to the sheriff's office to report the accident, and asked for Duvall, who was at the clinic. On their way home they again searched the area and found a hat and a shoe near the road. When Duvall came to the house they showed him these objects, which Duvall told them to dispose of. They all searched the road once more, but found nothing.

The next morning the Fearings asked Duvall if a patient at the clinic might have been involved in the accident. Duvall assured them she had not and told Malcolm he could get the car repaired. The Fearings resumed searching the scene and found an old wooden post. They met Duvall, showed him the post, and decided that was not the object Charles had hit. They then discovered the body and Duvall sent Charles home, as he had become very upset. Duvall and Malcolm drove past the body again, but did not stop except to retrieve the post. Upon reaching Charles's house, Duvall told Malcolm to beat the post to knock off the dirt, and then told Charles to sweep up the debris. He asked about the hat and shoe and felt through the ashes after being told the items had been burned. Duvall said he was going to the sheriff's office and told Malcolm and Charles to wait a few minutes before reporting the body. Duvall acted surprised when he was told about the Fearings' finding a body.

Duvall testified on his own behalf that while he was at the clinic, he was approached by the Fearings, who thought Charles may have hit a sign. He went to look at the car, but left after receiving a radio call. He later rode up and down the highway with the Fearings but found nothing. He was shown a shoe they had found, and was told they also had found a hat, but he only remembered telling Charles he didn't care what was done with them. Duvall spent the rest of the night on a helicopter call. He did not report the accident that night because he thought it was simply a case of a sign being hit.

Duvall further testified that when the Fearings flagged him down the next day, saying they had found a body, he became upset and confused, and could not remember the subsequent events clearly.

Only the accessory charge was submitted to the jury. From a

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verdict of guilty and a judgment imposing a sentence of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., and Aldridge, Seawell & Khoury, by G. Irvin Aldridge, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant brings forward twenty-three assignments of error. For organizational purposes in this opinion, those arguments which we feel merit discussion will be grouped into subdivisions.

[1] We note at the outset that in order to convict defendant of being an accessory after the fact under N.C.G.S. 14-7, the state must prove the following: (1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony. *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563 (1977); *State v. Martin*, 30 N.C. App. 166, 226 S.E.2d 582 (1976). To prove the first element, the state in this case must show that the principal was driving the vehicle involved in an accident resulting in injury to or death of the victim, that the principal so knew, and that he failed to stop his vehicle immediately at the scene. *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965); *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962); *State v. Fearing*, 48 N.C. App. 329, 269 S.E.2d 245, *cert. denied*, 301 N.C. 99 (1980).

I.

[2] Two of defendant's assignments of error concern the special venire called from Perquimans County. Defendant contends that Judge Brown erred in granting the state's motion for a special venire on 4 December 1979 after Judge Browning had denied such a motion on 7 June 1979. He argues that the order impermissibly overruled the other judge's earlier ruling.

It is true that one superior court judge ordinarily may not overrule a prior judgment of another superior court judge in the same case on the same issue. *Calloway v. Motor Co.*, 281 N.C. 496,

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189 S.E.2d 484 (1972); *State v. McClure*, 280 N.C. 288, 185 S.E.2d 693 (1972); *Carr v. Carbon Corp.*, 49 N.C. App. 627 (1980). However, this rule is inapplicable to interlocutory orders, which do not determine the issue, but rather direct some proceeding preliminary to a final decree. *Carr, supra*. A motion for a special venire is a pretrial order, the granting or denial of which is within the trial court's sound discretion. N.C. Gen. Stat. 15A-958. *See also State v. Yoes and Hale v. State*, 271 N.C. 616, 157 S.E.2d 386 (1967). "Interlocutory orders are subject to change 'at any time to meet justice and equity of the case upon sufficient grounds shown for the same.'" *Calloway, supra* at 502, 189 S.E.2d at 488. Therefore, when the circumstances have changed during the time between the original denied motion and the subsequent renewed motion, a trial judge may, in his discretion, grant the renewed motion in the interest of justice.

More than five months elapsed between the two motions for a special venire. The state presented additional and current evidence that defendant would not be able to receive a fair and impartial trial before a jury comprised of residents of Dare County, where he was a prominent citizen and where considerable publicity had occurred. We hold that Judge Brown did not abuse his discretion by hearing and granting the renewed motion. Furthermore, in the same order, the court granted defendant's motion for a trial separate from codefendant Malcolm Fearing, which motion had previously been denied by a different superior court judge. As defendant was a beneficiary of the court's action, he is hardly in a position to complain of the propriety of that order.

Defendant contends that the court erred in denying his motion that a special venire be called from a county other than Perquimans. He argues that the earlier trial of Malcolm Fearing before jurors of that county, in addition to newspaper coverage of the trials, created prejudicial pretrial publicity.

As previously discussed, a motion for a special venire is addressed to the trial court's sound discretion. Its rulings will not be disturbed on appeal absent a clear showing of abuse. *State v. Hopper*, 292 N.C. 580, 234 S.E.2d 580 (1977); *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976). Similarly, the trial judge is vested with broad discretion in determining the competency of the jurors. N.C. Gen. Stat. 9-14; *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *death penalty vacated*, 428 U.S. 902 (1976). A party has no

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right to seat a particular juror, but only to reject one who is prejudiced against him. *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969). See also *State v. Corl*, 250 N.C. 258, 108 S.E.2d 615 (1959).

We have carefully reviewed defendant's motion and the seventy-four pages of the record which contain the jury selection process and are satisfied that Judge Brown did not abuse his discretion in determining that the jurors from Perquimans County would afford defendant a fair trial. See *Brower, supra*. These assignments of error are overruled.

II.

[3] Defendant assigns error to the denial of his motion for the trial judge's disqualification under N.C.G.S. 15A-1223. Defendant asserts that he was deprived of a fair trial because the judge was biased against him, as he had presided over the earlier trial of codefendant Malcolm Fearing, where testimony that tended to incriminate the present defendant was heard. Defendant supports his theory by reference to other of his assignments of error, which he alleges demonstrate Judge Brown's actual bias during trial.

N.C.G.S. 15A-1223(b)(1), (4) provides:

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party; or

....

(4) For any other reason unable to perform the duties required of him in an impartial manner.

As an impartial judge is a prime requisite of due process, a judge's personal interest in the outcome of a case is considered sufficient ground for his disqualification. *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951). But in the absence of substantial evidence in the record of personal interest or bias, a judge will not be required to recuse himself. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *disc. rev. denied*, 294 N.C. 441 (1978); *In re Custody of Cox*, 24 N.C. App. 99, 210 S.E.2d 223 (1974), *cert. denied*, 286 N.C. 414 (1975). Even in instances where a judge has presided over an earlier trial of the same defendant, he need not be disquali-

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fied absent evidence that the prior trial would have a prejudicial effect on the rulings and outcome of the present case. *Love, supra*; *Perry v. Perry*, 33 N.C. App. 139, 234 S.E.2d 449, *disc. rev. denied*, 292 N.C. 730 (1977). *See also State v. Vega*, 40 N.C. App. 326, 253 S.E.2d 94, *disc. rev. denied*, 297 N.C. 457, *cert. denied*, 444 U.S. 968 (1979); *Cox, supra*.

Defendant contends that certain comments made by the judge in the presence of the jury and his refusal to recess upon defendant's motion illustrate Judge Brown's actual prejudice toward defendant and created an unfavorable atmosphere during the course of the trial. During jury selection, after counsel for defendant had apparently used all his peremptory challenges, counsel approached the bench and requested permission to challenge a juror out of the presence of the other jurors. The court denied defendant's motion and announced his decision before the jurors. From the record, we find that Judge Brown followed the jury selection procedure outlined in N.C.G.S. 15A-1214, which makes no provision for in-chambers or bench conference rulings on a juror's competence. No special circumstances are evident which would have justified defendant's motion, and Judge Brown properly exercised his discretion in so denying it.

During direct examination, defendant had embarked upon an irrelevant topic and Judge Brown admonished him not to volunteer answers. Defendant argues this incident also demonstrates the judge's prejudice toward him. The judge's warning was entirely proper. *See State v. Herbin*, 298 N.C. 441, 259 S.E.2d 263 (1979); *State v. Chandler*, 30 N.C. App. 646, 228 S.E.2d 69 (1976). We do not find that Judge Brown's comments constituted an impermissible expression of opinion. The trial judge has a duty, as well as a right, to conduct the trial in an orderly, efficient manner. *See State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

Defendant also insists that the judge's denial of his motion to recess showed bias against him. Additionally, he asserts that the extended courtroom hours deprived him of effective assistance of counsel by abridging preparation time between sessions. We find that Judge Brown was well within his discretion in continuing this lengthy trial into the evening hours, to maintain its momentum in the interest of the efficient administration of justice. *See Frazier, supra*. These assignments of error are without merit.

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III.

Defendant assigns error to numerous portions of the testimony which were admitted over his objections or refused admission upon sustentation of the prosecutor's objections.

Defendant first contends that the trial court erred in overruling his objections to a series of questions directed to trooper Bonner regarding defendant's actions at the scene where the body was discovered. During direct examination, Bonner testified that defendant had not said anything to him about the post, about his having seen the body earlier, or about his being at Charles Fearing's house after the discovery of the body. Defendant contends these questions were leading and called for responses which were improper hearsay. He further contends his silence was used at trial to show his culpability, denying him of his fifth amendment rights.

[4] The questions concerned defendant's conduct at the scene of the alleged crime. Conduct, in this case defendant's silence, is subject to exclusion as hearsay as an expression of the actor's thoughts. *See* 1 Stansbury's N.C. Evidence § 142 (Brandis rev. 1973). However, anything that a defendant has done that is relevant to the case and not subject to some specific exclusionary rule or statute may be used against him as an admission. 2 Stansbury, *supra*, § 167. "An admission may be *implied* or inferred from any conduct of a party which fairly indicates a consciousness of the existence of a relevant fact." 2 Stansbury, *supra*, § 178 (emphasis in original). While not sufficient standing alone, conduct may be considered in connection with other facts in determining whether it constitutes an admission. *Id.* Here, defendant's silence is relevant in that he failed to share his knowledge of facts concerning a crime with a fellow police officer who was investigating that crime. His silence under the circumstances implies his knowledge of or participation in a cover-up. *Cf. State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973) (evidence of flight as admission); *State v. Wilson*, 23 N.C. App. 225, 208 S.E.2d 393 (1974) (defendant's agreeing, but failing, to come to discuss accusations constituted evidence of admission where later efforts to locate him were unsuccessful).

"Silence alone, in the hearing of a statement, is not what makes it evidence of probative value, but it is in connection with some circumstance or significant conduct on the part of the listener that gives the statement evidentiary weight." *State v. Evans*, 189 N.C.

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233, 235, 126 S.E. 607, 608 (1925). In the case *sub judice*, defendant's silence was not used to prove the truth of a statement made in his presence which he would have been expected to deny if it were false. Rather, it was part of the *res gestae*, the circumstances surrounding the crime. See *State v. Cawthorne*, 290 N.C. 639, 227 S.E.2d 528 (1976). Defendant was not then under arrest nor subject to interrogation. Therefore we find no merit in defendant's reliance on *State v. Moore*, 262 N.C. 431, 137 S.E.2d 812 (1964) (right to remain silent upon accusations of investigating officers), and *State v. Guffey*, 261 N.C. 322, 134 S.E.2d 619 (1964) (silence in face of incriminating statements are admissions only in limiting circumstances). Additionally, the trial court has considerable discretion in allowing leading questions. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932 (1976). We hold that these questions, and answers thereto, were not improperly allowed.

[5,6] Defendant contends that the court should not have sustained the state's objections to questions on cross-examination of Bonner. Defendant argues Bonner's answers would have shown that he did not suspect defendant's involvement in the alleged cover-up. These objections were properly sustained, as Bonner's opinion as to defendant's guilt was irrelevant to the issue of whether defendant was actually involved. The question of his guilt or innocence was properly one for the jury. *E.g., State v. Forrest*, 262 N.C. 625, 138 S.E.2d 284 (1964). We further find no merit in defendant's argument that Bonner's testimony and portions of his notes from the investigation would have impeached his credibility. Bonner's answer, contained in the record, that he was at that time becoming suspicious that a cover-up might be occurring, is not inconsistent with his statement that he had no suspects at the time he began investigating. Trooper Bonner's notes were not competent evidence, as "[r]eports of investigating officers are the work product of the prosecution, and there is no constitutional right to their examination." *State v. Jones*, 23 N.C. App. 686, 688, 209 S.E.2d 508, 510 (1974), *cert. denied*, 286 N.C. 418 (1975). Nor did defendant make a pretrial motion to examine the report. See *Jones, supra*. Furthermore, Judge Brown offered to allow the notes to be read into the record. Defendant's arguments are without merit.

[7] Likewise, we find that the court committed no error in denying admission of statements of an SBI agent about whether defend-

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ant was a suspect. Defendant contends these statements would have shown that he cooperated in the investigation, negating his involvement in a cover-up. The answers contained in the record do not support defendant's theory. Even if they did, defendant's cooperation with investigators on 23 February would not demonstrate that he had not been involved at the time of the alleged cover-up, 19 and 20 February.

[8] Defendant argues the court should have admitted evidence concerning whether he was willing to take a polygraph test, as demonstrative of his cooperation with the investigators. Again, such evidence is irrelevant to defendant's actions on 19 and 20 February. Furthermore, although test results themselves were not offered into evidence, this testimony would create an inference that defendant took and passed a polygraph test. Polygraph results are not admissible in this state. *State v. Brunson*, 287 N.C. 436, 215 S.E.2d 94 (1975). *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961).

[9] Defendant contends the court erred in sustaining the state's objection to a question concerning the height of the automobile's bumper if the brakes were applied. The state's expert witness had just testified that, normally, application of the brakes would cause the front end to dip. Counsel for defendant then asked the witness:

Q. If it could be shown that the front of the car was from three to four inches lower than seventeen inches at the time of the impact would it be your opinion that brakes had been applied?

OBJECTION. SUSTAINED.

....

(The witness whispered his answer to the court reporter:

A. Under the proper conditions this could happen, yes.)

This question was improper because it was a hypothetical based on facts not in evidence. *See State v. Bock*, 288 N.C. 145, 217 S.E.2d 513 (1975), *death penalty vacated*, 428 U.S. 903 (1976); 1 Stansbury, *supra*, §§ 136, 137. There was no evidence that Charles Fearing had applied the brakes. In light of the witness's earlier testimony, even if the question had been proper, defendant was not prejudiced by the sustention of the objection.

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[10] Defendant argues that the court should have admitted the testimony of his expert witness, a psychiatrist, giving his definition of "panic" and his opinion of whether defendant suffered panic upon discovery of Creef's body.

Expert testimony and opinions are admissible on all matters where such testimony would be helpful to the jury because of the expert's superior knowledge. *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E.2d 71 (1966); 1 Stansbury, *supra*, § 134. In this case, the general definition of panic is one a layperson would know and understand, and no expert testimony is necessary. In *State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979), the Court articulated the general propositions regarding expert medical testimony to be:

(1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. *Penland v. Coal Co.*, *supra*, 246 N.C. 26, 97 S.E.2d 432 [1957].

When information is given the doctor by the patient in the course of treatment, there exists an assumption that the patient's self-interest will ensure that the information is true, thus qualifying it for the basis of opinion testimony. *Wade, supra*.

Here, the record does not indicate that Dr. Ravaris was treating defendant as a regular patient with a view towards treatment or cure. Dr. Ravaris testified he met with defendant for an hour and a half on 9 April 1979, at which time defendant told him about the events of 19 and 20 February 1979. If medical advice is sought merely for the purpose of defense at trial, the assumption of inherent truthfulness of the information given to the doctor is absent. See *Bock, supra*; *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E.2d 194 (1973). Thus the correct form of the question as to whether Dr. Ravaris was of the opinion that defendant panicked would have been a hypothetical question, rather than a direct one. See 1 Stansbury, *supra*, § 136; *Bock, supra*. As the opinion sought was based

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upon facts not in evidence, the court properly excluded this testimony.

It is apparent that defendant sought to introduce the expert testimony as evidence that he in fact did panic, to establish that he was confused and not thinking logically upon discovering the body. Diminished capacity is not a defense, nor did defendant attempt to establish a defense of insanity. *Cf. Bock, supra* (amnesia itself no defense to criminal charge); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970) ("pathological intoxication" not a defense to murder charge). Defendant's evidence that he panicked or became confused would not tend to negate any of the necessary elements of the crime, discussed earlier in this opinion. Additionally, defendant himself testified, in effect, that he had panicked; therefore, the substance of the proffered expert testimony was before the jury and defendant was not prejudiced by the denial of its admission.

[11] Defendant further contends that the court erred in refusing to declare Charles Fearing a hostile witness during his redirect examination, which would have allowed defendant to ask leading questions to impeach Fearing's credibility. The settled rule in North Carolina is that a party may not impeach his own witness. *State v. Pope*, 287 N.C. 505, 215 S.E.2d 139 (1971); *State v. Salame*, 24 N.C. App. 1, 210 S.E.2d 77 (1974), *cert denied*, 286 N.C. 419 (1975); 1 Stansbury, *supra*, § 40 (although the rule has been modified in civil cases by Rule 43(b), North Carolina Rules of Civil Procedure). The decision whether to declare a witness hostile or adverse rests within the trial court's sound discretion and will not be reversed absent a showing of abuse. *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, *cert. denied*, 409 U.S. 888 (1972); *State v. Clanton*, 278 N.C. 502, 180 S.E.2d 5 (1971). The significance of excluded testimony must be made to appear in the record to be reviewable. *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387 (1978); *Spinella v. Pearce*, 12 N.C. App. 121, 182 S.E.2d 620 (1971). Here, we do not find that Charles Fearing's testimony, nor the answer given outside the presence of the jury, demonstrates an unwillingness to answer or an interest adverse to defendant's. Rather, it tended to negate his own guilty conduct involving the accident, which, if believed by the jury, would have exculpated defendant. Furthermore, defendant's witness Malcolm Fearing presented essentially the same evidence. We find no error or prejudice. These assignments of error are overruled.

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IV.

The next category of defendant's assignments of error deals with exhibits.

[12] Defendant objects to the state's use of a photograph of the accident victim, Cloice Creef. He contends no proper foundation was laid for the photograph's introduction, that it was not a fair and accurate representation, that it was not illustrative of the witness's testimony, that it was irrelevant and prejudicial, and that testimony regarding the photograph related to matters not yet in evidence.

Photographs are admissible if they tend to show circumstances relating to the crime. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death penalty vacated*, 408 U.S. 939 (1972); *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971). Although the pictures must portray a scene or person observed by the witness, they need not be an exact reproduction, nor must they have been made at the time the event occurred. See *State v. Lentz*, 270 N.C. 122, 153 S.E.2d 864, *cert. denied*, 389 U.S. 866 (1967). Here, the photograph was relevant in establishing the identity of the victim. The witness, Creef's son-in-law, after testifying as to his observations of Creef's actions on 19 February, was asked how Creef looked. The picture was used to illustrate his testimony. Minor discrepancies were pointed out. Any technical errors in the photograph's admission are harmless, as defendant had the opportunity to cross-examine the witness and it does not appear that he was prejudiced by its admission. See *State v. Cross*, 293 N.C. 296, 237 S.E.2d 734 (1977).

Defendant argues that the court erred in admitting the state's exhibits consisting of articles of Creef's clothing, particles of the automobile's windshield, ashes from Charles Fearing's fireplace, and fragments of wood and glass. He contends that there was no evidence that the Fearing automobile had not hit Creef and that this evidence only served to prejudice defendant by exciting the sympathy of the jury.

These exhibits tend to show a necessary element of the offense of accessory after the fact: that the principal crime was committed. See *Squire, supra*; *Martin, supra*. The fact that evidence may arouse the jury's emotions is not sufficient in itself for its exclusion. See *Cutshall, supra*; *Atkinson, supra*.

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[13] Defendant argues that the court should have granted his motion to have the jury view the automobile at night, rather than in the daylight, as defendant first observed the car at night. The state contends the daytime view was proper because the SBI agents who were testifying examined the vehicle during the day. We agree.

Tangible objects are admissible where they relate to the crime. *See State v. Felton*, 283 N.C. 368, 196 S.E.2d 239 (1973). The damaged automobile was direct evidence that the hit-and-run accident had occurred. Any change in the appearance of the automobile under these conditions was not substantial and defendant had the opportunity to point out any differences. *See State v. Carnes*, 279 N.C. 549, 184 S.E.2d 235 (1971); *State v. McLeod*, 17 N.C. App. 577, 194 S.E.2d 861 (1973). The accessory charge against defendant did not rest solely on his own conduct that night. We hold that the daytime jury view was within Judge Brown's discretion. *See Huff v. Thornton*, 287 N.C. 1, 213 S.E.2d 198 (1975); *State v. Smith*, 13 N.C. App. 583, 186 S.E.2d 600, *cert. denied*, 281 N.C. 157 (1972).

Defendant objects to the court's refusal to allow into evidence a pair of ski gloves found in his car, as relevant to showing that he was set up. Again we find admission of such evidence was within the judge's discretion and find no abuse. Although evidence that a crime was committed by a third party is not admissible unless it directly points to the guilt of that party, *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977), defendant was allowed to put before the jury his theory that he was set up and to testify as to the gloves. He was not prejudiced by their exclusion as an exhibit.

[14] Defendant contends that it was error for the court to deny his motion to suppress the accident report he submitted to the Dare County sheriff. A *voir dire* was held, at which both defendant and the state presented evidence and Judge Brown made findings of fact and conclusions of law. These findings are conclusive on appeal if supported by the evidence. *State v. Miley*, 291 N.C. 431, 230 S.E.2d 537 (1976); *State v. Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). Defendant argues that the court's conclusion that his report was voluntarily made is not supported by the evidence.

Defendant concedes that he had a duty to make the report under N.C.G.S. 20-166.1(e), and that extrajudicial admissions by a defendant are admissible if they are voluntarily and knowingly made. *State v. Muse*, 280 N.C. 31, 185 S.E.2d 214 (1971), *cert. denied*,

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406 U.S. 974, *rehearing denied*, 409 U.S. 898 (1972). We cannot accept defendant's argument that his performance of an official duty in the course of his job amounted to official coercion and supported his motion to suppress. The record reveals no evidence that defendant resisted or objected to making his report. He had several days to write the report at the time and place he desired. He showed the document to his attorney before submitting it. There was no connection between defendant's being told to write the report and his later conversations with SBI agents. We find that the state carried its burden of proving that the report was admissible. *See State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd as to death penalty*, 403 U.S. 948 (1971). Looking to the entire record, we find no error in the trial court's conclusion that the statement was voluntarily made. *See State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975). We reject these assignments of error.

V.

[15] Defendant excepts to the following portion of the court's charge to the jury:

So I charge that if you find from the evidence and beyond a reasonable doubt that on or about February 19, 1979, the crime of failure to immediately stop a 1972 Mercedes motor vehicle at the scene of an accident involving injury or death to Cloice H. Creef, was committed by Charles S. Fearing, that is to say that on or about February 19, 1979, Charles S. Fearing while driving a 1972 Mercedes, was involved in an accident in which Cloice H. Creef was physically injured or killed, and that Charles S. Fearing knew of the accident and wilfully failed to immediately stop at the scene, and that thereafter on or about February 20, 1979, the defendant, Claudie Clara Duvall, knowing Charles S. Fearing to have committed the felony of failure to immediately stop the 1972 Mercedes motor vehicle at the scene of an accident involving injury or death to Cloice H. Creef, assisted Charles S. Fearing to avoid apprehension, arrest, or punishment, by failing to report or investigate the accident or by failing to preserve evidence, or by directing that dirt be knocked off a post so it would look like it had hit the car, it would be your duty to return a verdict of guilty

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of an accessory after the fact of failure to immediately stop the 1972 Mercedes motor vehicle at the scene of an accident involving injury or death to Cloice H. Creef.

However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues the court erred in stating that if the jury should find that defendant directed that dirt be knocked off a post so that it would look like it had been hit by the car, the jury should find defendant guilty. He alleges that there is absolutely no evidence to support this instruction.

The evidence necessary for inclusion in a charge need not be direct statements of the witnesses. The necessary elements of a crime may be made out from clear inferences supplied by all the evidence presented. *See State v. Culter*, 271 N.C. 379, 156 S.E.2d 679 (1967). Malcolm Fearing testified that defendant suggested that he knock the dirt from the post. Charles Fearing stated that defendant directed him to sweep up the debris. Other portions of their testimony also support the inference that defendant suggested this action so as to make it appear that the post was the object which Charles Fearing struck. Defendant's official accident report also supports this inference. We find no error in the instruction.

[16] Although defendant did not raise objections to other portions of the charge in his brief or in oral argument, we feel it necessary to comment on the portion concerning Charles Fearing's knowledge of the accident, as this Court has recently awarded a new trial for Malcolm Fearing on the basis of similar instructions. *State v. [Malcolm] Fearing* (filed 3 February 1981) (Hedrick, J., dissenting on grounds that this Court declared an assignment of error based on identical instructions to be without merit in *State v. [Charles] Fearing, supra*). The Malcolm Fearing case was overturned on the basis that the instruction implied that the driver's willful failure to stop upon knowledge that an accident had occurred, whether or not he knew that a person had been injured or killed, would support finding a violation of N.C.G.S. 20-166. Judge Wells, speaking for the Court, held that to establish the necessary guilty knowledge, the state must show that the driver knew that a person had been injured or killed in the accident. We hold in the case *sub judice* that the instruction, read in context, complied with this standard. The

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phrase “if Charles S. Fearing knew of *the* accident” (emphasis added) clearly relates to the preceding clause and other portions of the charge describing the accident as that “in which Cloice H. Creef was physically injured or killed.”

We find no error in the court’s charge to the jury.

VI.

Defendant assigns error to the court’s denial of his motions to dismiss, to set aside the verdict as being contrary to the greater weight of the evidence, for judgment notwithstanding the verdict, for new trial, and for appropriate relief. Defendant contends that the state failed to carry its burden of proof and that the evidence is insufficient to support the verdict. We disagree.

The standards for granting these motions are well familiar and will not be reiterated here. A careful review of the record convinces us that the state presented evidence by which a reasonable jury could find beyond a reasonable doubt all the necessary elements of the crime of which defendant was charged, as set out at the beginning of this opinion.

[17] Finally, defendant contends that he should have been placed on probation. Defendant recognizes that probation is not an absolute right, but is a matter of legislative grace. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967). It rests within the sound discretion of the trial court. *See State v. Pope*, 257 N.C. 326, 126 S.E.2d 126 (1962); *State v. Stallings*, 234 N.C. 265, 66 S.E.2d 822 (1951). Defendant argues that Judge Brown failed to exercise his discretion and dismissed the motion summarily, citing the following dialogue: “MR. BLOUNT: Would you consider suspending it, Your Honor? COURT: No, sir.” However, defendant ignores the fact that a full presentencing hearing was held, during which defendant was allowed to present and discuss his views, while the state made no recommendation regarding sentencing. The sentence imposed was well within the statutory limit set by N.C.G.S. 14-7 and we will not disturb it on appeal. *See State v. Legette*, 292 N.C. 44, 231 S.E.2d 896 (1977); *State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976).

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

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Judges WEBB and WHICHARD concur.

GREAT SOUTHERN MEDIA, INC., AND B. E. FOWLER, PLAINTIFFS v. McDOWELL COUNTY, A BODY POLITIC AND CORPORATE; PAUL RICHARDSON, CHAIRMAN, McDOWELL COUNTY BOARD OF COMMISSIONERS; GUY L. HENSLEY, VICE-CHAIRMAN, McDOWELL COUNTY BOARD OF COMMISSIONERS; GEORGE G. ELLIS; JANE GREENLEE; AND NED L. MCGIMSEY, MEMBERS, McDOWELL COUNTY BOARD OF COMMISSIONERS; RONI HALL, McDOWELL COUNTY BOARD OF COMMISSIONERS; RONI HALL, McDOWELL COUNTY TAX COLLECTOR; AND JACK H. HARMON, COUNTY MANAGER, McDOWELL COUNTY; ALL INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; AND JAYVEE PUBLISHING COMPANY, A PARTNERSHIP, DEFENDANTS

No. 8029SC540

(Filed 3 March 1981)

1. Notice § 2; Taxation § 39.2— notice of tax lien sale — newspaper of general circulation — evidence of unpaid distribution

While evidence of unpaid distribution of a newspaper might have been irrelevant to a determination of whether the newspaper was one of “general circulation to actual paid subscribers” which could properly publish notices of tax lien sales, the admission of such evidence was not prejudicial error in this case since the evidence supported the court’s findings with respect to actual paid subscribers and the court did not rely upon such evidence in its findings and conclusions.

2. Notice § 2; Taxation § 39.2— notice of tax lien sale — newspaper with a general circulation to actual paid subscribers

A newspaper publishing notices of tax lien sales must be one with a “general circulation to actual paid subscribers” as required by G.S. 1-597 rather than merely one of “general circulation in the taxing unit” as required by G.S. 105-369(d).

3. Notice § 2; Taxation § 39.2— newspaper of general circulation

A newspaper of general circulation is a publication to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinions, and advertisements, and thereby to render it probable that a “notice” would be brought to the attention of the general public.

4. Notice § 2; Taxation § 39.2— newspaper of general circulation

Whether a newspaper is one of general circulation is not determined merely by the number of its subscribers, but by the diversity of those subscribers, and even if the newspaper is of particular interest to a particular class of persons, if it contains news of a general character and interest to the community, although that news may be limited in amount, the newspaper qualifies as one of general

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circulation.

5. Notice § 2; Taxation § 39.2— notice of tax lien sales — newspaper of general circulation to actual paid subscribers — sufficiency of findings

The trial court properly concluded that a newspaper was one of “general circulation to actual paid subscribers” which could properly publish a county’s notices of tax lien sales where the court made findings supported by competent evidence that the newspaper has actual paid subscribers in all parts of the county; the newspaper contains a wide variety of news items and advertisements of importance to all citizens of the county; the newspaper is not intended to serve any particular class of persons; although the newspaper is published in a small town, it does not merely cover items of interest to the town; and the paid distribution of the newspaper covers an area containing the bulk of the county’s registered voters.

6. Notice § 2; Taxation § 39.2— notice of tax lien sales — choice of newspaper by tax collector — ratification by county commissioners

When a county tax collector decided that the notice of sale of tax liens was to be published in a specific newspaper and then orally contracted for the publication, the tax collector was merely performing one of the incidental and administrative duties associated with carrying out a directive by the Board of County Commissioners pursuant to G.S. 105-369(a) as to handling the sale of tax liens. However, if formal action by the county commissioners was necessary with respect to authorizing the publication of the tax lien sale notice in such newspaper, the action of the commissioners in thereafter ratifying the actions taken by the tax collector satisfied that requirement.

Judge CLARK dissenting.

APPEAL by plaintiffs from *Ferrell, Judge*. Judgment entered 24 December 1979 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 6 January 1981.

This is a declaratory judgment action wherein plaintiffs, publishers of *The McDowell News*, a newspaper in McDowell County, seek to have defendant McDowell County’s notice of tax lien sales for the year 1979 published in *The Old Fort Dispatch*, another newspaper in McDowell County, declared to be of no force and effect and to have the actions of the defendant individuals, acting on behalf of defendant county in causing such publication, declared improper and invalid. Plaintiffs also seek to enjoin any further publication of tax lien sale notices in *The Old Fort Dispatch* and publication of such notices without formal action of the McDowell County Board of Commissioners at a public and open meeting. In the first claim for relief in their complaint, plaintiffs, among other things, alleged the following: Pursuant to G.S. § 105-369(d), McDowell County is required to publish once a week for four succes-

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sive weeks preceding the annual tax lien sale a notice of the sale in a newspaper "having general circulation in the taxing unit"; the cost of publishing the notice is paid from the general revenues of the county generated by payment of taxes by citizens of the county including plaintiffs; this notice must also satisfy the requirements of G.S. § 1-597, including that the notice is to be published in a newspaper "with a general circulation to actual paid subscribers"; *The McDowell News*, published by plaintiffs, is the only newspaper in McDowell County meeting the criteria of G.S. §§ 1-597, 105-369(d); while for many years prior to 9 May 1979 McDowell County had its tax lien sale notice published in *The McDowell News*, defendant McDowell County, acting through the defendant individuals, caused the 1979 notice to be published in consecutive weeks beginning 9 May 1979 in *The Old Fort Dispatch*, another newspaper in McDowell County; *The Old Fort Dispatch* does not meet the previously mentioned requirements of G.S. §§ 1-597, 105-369(d), and publication of the tax lien sale notice in the *Dispatch* "is, therefore, unlawful and of no force and effect, and the expenditure of public funds for same is improper"; and such publication, unless restrained, would result in sales without actual or legal notice to the owners of the property and "without meaningful opportunity, in a manner consistent with due process of law, to contest the amount of taxes alleged to be due and the sale of the tax lien."

In their second claim for relief, plaintiffs alleged that the order of the McDowell County Board of Commissioners regarding the advertisement and sale of the tax liens, and the contract made with *The Old Fort Dispatch* as a result, were "not corporate actions authorized by the defendant county commissioners as a body convened in legal session . . ." and therefore the order was "unlawful and invalid" and the contract was "improper and void." Plaintiffs' third claim for relief alleged that the actions taken by defendants in ordering the advertisement and sale of the tax liens and in contracting with *The Old Fort Dispatch* for the publication of such advertisement, were "not deliberated and decided at an official public meeting of the Board of Commissioners of McDowell County, . . . and is therefore unlawful" under G.S. § 143-318.1 *et. seq.* In their fourth claim for relief, plaintiffs alleged that no notice of the tax lien sale for 1979 had been posted at the courthouse in violation of G.S. § 105-369(d). Plaintiffs sought temporary and permanent injunctive relief.

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Defendants, excluding defendant Jayvee Publishing Company, answered 13 July 1979, admitting the following: the requirements of G.S. §§ 1-597, 105-369(d) must be met in publication of notice of tax lien sales; *The McDowell News* meets the criteria of G.S. §§ 1-597, 105-369(d); for many years, *The McDowell News* had published the annual notice of tax lien sales; defendants Hall and Harmon (county tax collector and county manager, respectively) caused the notice of tax lien sales for 1979 to be published in *The Old Fort Dispatch*; and the final publication of the tax lien sale notice was made on 30 May 1979 with the tax lien sale held on 4 June 1979. These defendants, however, denied the other material allegations of the complaint, and specifically alleged the following: *The Old Fort Dispatch* meets all the criteria of G.S. §§ 1-597, 105-369(d); no action of the McDowell County Board of Commissioners was required to authorize the particular newspaper in which the notice of the tax lien sales were to be published, or to contract with *The Old Fort Dispatch* for publication of the notice, said matters being "in the discretion of the Tax Collector and County Manager;" notwithstanding this, the defendant county commissioners did discuss publication in *The Old Fort Dispatch* at a meeting, open to the public pursuant to published legal notice, of the Board of County Commissioners, sitting as a Board of Equalization and Review, sometime prior to the first publication in the *Dispatch*, and on 1 June 1979 at the regularly scheduled meeting of the Board of County Commissioners, the Board did approve the publication in, and the contract with, *The Old Fort Dispatch*, as negotiated by the county tax collector and the county manager; and notice of the tax lien sales was properly posted at the county courthouse. These defendants also moved to dismiss the action pursuant to G.S. § 1A-1, Rule 12(b)(6) and for the lack of standing of plaintiffs to institute the action. Defendant Jayvee Publishing Company, publishers of *The Old Fort Dispatch*, answered 19 June 1979, making the same motions to dismiss and essentially the same admissions, denials, and allegations regarding *The Old Fort Dispatch* as the other defendants.

Prior to the introduction of evidence at trial, the parties stipulated *inter alia*, to the following: The McDowell County Board of Commissioners adopted a motion at their 1 June 1979 meeting ratifying and approving the publication of the notice of tax lien sales in *The Old Fort Dispatch* during the period in question; the notice was posted on a bulletin board at the McDowell County Administration Building, which houses the County Tax office and

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various other county offices, but was not posted on the bulletin board "better known as the 'courthouse bulletin board'" located in the building housing the Clerk's office, Register of Deeds, and courtrooms; *The Old Fort Dispatch* is a newspaper "issued" in McDowell County which has been published one day each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding 9 May 1979; *The Old Fort Dispatch* has been admitted to the United States mails as second-class matter; *The Old Fort Dispatch* has "actual paid subscribers, meaning that there are at least two or more paid subscribers in McDowell County"; and

[t]he only places outside of the Old Fort Community in McDowell County from which there has been a paid circulation, other than mail circulation, of *The Old Fort Dispatch* are three places of business, to wit: East Side Newsstand in Marion; G & G Minute Mart in the Greenlee, Pleasant Gardens Community; and Lake Tahoma Steak House in Pleasant Gardens Community.

Following evidence presented by plaintiffs and by defendant Jay-vee Publishing Company, the court made the following pertinent findings of fact:

(1) *The Old Fort Dispatch* is a newspaper issued in McDowell County, North Carolina, that has been regularly and continuously issued in McDowell County, North Carolina since November 15, 1973.

(2) *The Old Fort Dispatch* has been published one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding May 9, 1979.

(3) *The Old Fort Dispatch* has been admitted to the United States Mails as second class matter in McDowell County, North Carolina.

(4) *The Old Fort Dispatch* has actual paid subscribers in McDowell County, North Carolina.

(5) Actual paid subscribers of *The Old Fort Dispatch*, who receive their copies of said newspaper by mail, live on all ten (10) rural postal routes in McDowell County.

(6) Actual paid subscribers of *The Old Fort Dispatch* receive their copies by mail at city addresses through all

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three post offices in McDowell County and at street addresses in both of the incorporated towns within McDowell County, as follows: 162 businesses and individuals in Old Fort, North Carolina; 4 individuals in Nebo, North Carolina; and 77 businesses and individuals in Marion, North Carolina.

...

(9) *The Old Fort Dispatch* is available for purchase by the general public in McDowell County at approximately nine different locations within McDowell County.

(10) Approximately 285 copies of *The Old Fort Dispatch* are distributed to various businesses in the immediate Old Fort area for sale . . . All of the above distributed copies of *The Old Fort Dispatch* are sold or distributed every week and on occasion the proprietors of the above grocerys [sic] call for additional copies of said newspapers.

(11) Copies of *The Old Fort Dispatch* are distributed to three locations in McDowell County outside the Old Fort area for sale to the general public, as follows: The G & G Market between Greenlee and Pleasant Gardens Communities, Lake Tahoma Steak House in Pleasant Gardens Community, and East Side News Stand in the city of Marion. Fifteen copies of the May 9 issue of *The Old Fort Dispatch* were delivered to the East Side News Stand and two copies were sold. Approximately 20 to 25 copies of *The Old Fort Dispatch* are generally delivered each week to the G & G Market and to the Lake Tahoma Steak House but an undetermined number of said papers are sold at said locations.

(12) Approximately 20 to 25 copies of *The Old Fort Dispatch* are taken approximately every week to each of approximately 13 other businesses in the Marion area for free distribution to customers of said businesses, . . . On occasions when said businesses run full page ads with *The Old Fort Dispatch*, extra copies of said issue are delivered to said business for free distribution to its customers. On occasion, approximately 15 to 25 copies of *The*

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Old Fort Dispatch are taken to other businesses that advertise in *The Old Fort Dispatch* for free distribution to its customers.

(13) The approximate total circulation of *The Old Fort Dispatch* in the Marion area each week, both through sales and through free distribution, is 345.

(14) Businesses that advertise with *The Old Fort Dispatch* receive complimentary copies of *The Old Fort Dispatch* In addition to the businesses that receive copies of *The Old Fort Dispatch*, certain other public offices and agencies receive copies of *The Old Fort Dispatch* as follows: two libraries, one in Marion and one in Old Fort; the Sheriff of McDowell County; the Chamber of Commerce of McDowell County; and three governmental agricultural agencies.

(15) Since the publication of *The Old Fort Dispatch* began in 1973, there have been 201 advertisers from within McDowell County.

...

(17) The nature of the categories of items regularly contained within *The Old Fort Dispatch* include the following: current event news items that deal with Old Fort, McDowell County, and Marion; sports items that deal with teams from Old Fort, from McDowell County and from Marion; political columns from U. S. Congressman and U. S. Senator Helms; religious items; social news of Old Fort, McDowell County, and Marion; historical features, including old pictures of persons and places in McDowell County under the heading of "Shades of Yesterday"; human interest features; general and miscellaneous features; humorous items, including jokes and cartoons; legal notices; classified advertisements; commercial advertising from businesses in and around Old Fort, businesses from various places in McDowell County, businesses in and around Marion, and businesses from outside McDowell County; public service announcements, including full page promotional advertisements for the McDowell County United Way Campaign, United

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States Savings Bonds, etc.; commercial news; and agricultural news.

(18) Several lawyers from McDowell County, North Carolina, have caused to be published various legal notices in *The Old Fort Dispatch* . . . [lists nine Marion attorneys].

(19) Legal notices have also been sent to *The Old Fort Dispatch* for publication and such notices have actually been published for the following non-lawyers: The North Carolina Department of Transportation, Western Carolina Telephone Company, Duke Power Company, the Sheriff of McDowell County, and non-lawyer individuals serving as executors and administrators of descendant estates.

(20) *The Old Fort Dispatch* has regularly been publishing legal notices since 1976. The current rate for legal notices for *The Old Fort Dispatch* is \$1.25 per column inch. A reduced rate of \$1.15 was charged to McDowell County for the publication of the 1978 tax lien sale notices.

(21) The current rate charged by *The McDowell News* for publication of legal notices is \$2.20.

(22) The publication of the 1978 tax lien sale notices for McDowell County published in *The Old Fort Dispatch* in May of 1979 required the use of 2,494 column inches. The total amount of the bill of *The Old Fort Dispatch* to the McDowell County Tax Supervisor for the said publication is \$2,868.10.

(23) *The Old Fort Dispatch* published the 1977 tax lien sale notices for Old Fort Township and Crooked Creek Township in McDowell County in May of 1978 at a total approximate charge of \$500.00 for 400 column inches.

(24) For the years prior to 1978 the tax lien sale notice had always been published in *The McDowell News*, without any formal action by the McDowell County Board of Commissioners.

(25) The total number of registered voters in McDowell County as of October, 1978, was 15,864. The total number

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of registered voters as of said date in Marion Township was 8,313, or 52.4% of the registered voters in of McDowell County. The total number of registered voters in Old Fort Township as of said date was 1,863, representing 11.7% of the total registered voters of McDowell County. The total number of registered voters as of said date in Crooked Creek Township of McDowell County was 758, representing 4.8% of the county's registered voters. Montford-Cove Township as of said date had 592 registered voters, representing 3.7% of the county's total number of registered voters. The total registered voters for the four township [sic] in McDowell County of Montford-Cove, Crooked Creek, Old Fort and Marion contain 72.6% of the registered voters of McDowell County.

(26) The areas of McDowell County, North Carolina having the greatest circulation of *The Old Fort Dispatch* Newspaper are the same which contain 72.6% of the registered voters of McDowell County, using figures of October, 1978.

(27) The population of McDowell County is 30,000.

(28) Seventeen hundred copies of *The Old Fort Dispatch* have been published each week since the approximate date of the first publication of the 1978 tax lien sale notices for McDowell County in May of 1979. Prior to the publication by *The Old Fort Dispatch* of the 1978 McDowell County tax lien sale notices, 1,500 copies of *The Old Fort Dispatch* were published each week.

(29) The masthead of *The Old Fort Dispatch* reads in part "Proudly serving Old Fort and McDowell County, North Carolina."

(30) The decision to publish the notice of tax lien sale for delinquent [sic] 1978 taxes in *The Old Fort Dispatch* was made by the defendants, Tax Collector Roni Hall, and County Manager Jack Harmon.

(31) The defendant, County Manager Jack Harmon, discussed where they should publish the notice of tax lien sales with the McDowell County Board of Commissioners while they were sitting as the Board of Equalization and

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Review sometime in May prior to the first publication; but no official action was taken by the Board of Commissioners. The meeting of the Board of Equalization and Review was held pursuant to published notice and was open to the public.

(32) At the June 1, 1979 meeting of the McDowell County Board of Commissioners, there was unanimously adopted a motion ratifying and approving the selection of *The Old Fort Dispatch* for the publication of the notice of the tax lien sale for delinquent taxes for the year 1978.

(33) The contract for publication with *The Old Fort Dispatch* was an oral contract.

(34) The tax lien sale notice was posted on the bulletin board of the McDowell County Administration Building which is attached to the McDowell County Court House and is located upon the same lot known as the Court House Lot. The Administration Building houses the McDowell County Manager's Office, McDowell County Tax Office, McDowell County Social Service Office, and McDowell County Board of Elections. The McDowell County Administration Building does not house any Judicial Offices, but all such offices along with the Sheriff's and the Register of Deeds' Offices are housed in the building known as the McDowell County Court House. The McDowell County Administration Building was constructed some few years ago and the McDowell County Court House Building was constructed in the 1920's or 1930's. The roof of the Administration Building is attached to the wall of the Court House Building and serves as a parking deck for the McDowell County Sheriff's Department and employees who work in the Court House Building.

(35) Notices for the McDowell County Board of Commissioners and the McDowell Board of Elections are posted on the bulletin board in the lobby of the Administration Building. The notice of the tax lien sale was posted on the bulletin board of the McDowell County Administration Building on May 24, 1979 by posting a copy of the May 23rd notice that appeared in *The Old Fort*

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Dispatch. The bulletin board upon which the notice was posted had a sign that says "Notices" and is located in the lobby of the Administration Building next to the McDowell County Tax Office.

...

Based on these findings, the court made the following conclusions of law:

(1) *The Old Fort Dispatch* is a newspaper with a general circulation to actual paid subscribers in McDowell County within the meaning of N.C.G.S. Section 1-597, and meets all other requirements of N.C.G.S. Section 1-597.

(2) *The Old Fort Dispatch* is a newspaper having a general circulation in the taxing unit of McDowell County as required by N.C.G.S. Section 105-369(d).

(3) The McDowell County Tax Collector and the McDowell County Manager had the authority to select the newspaper in which to publish the notice of the tax lien sale for delinquent taxes for the year 1978, and no action was required of the McDowell County Commissioners.

(4) Even if the action of the McDowell County Board of Commissioners was required to place a notice of the tax lien sale of delinquent taxes for the year 1978 in *The Old Fort Dispatch*, the McDowell County Commissioners ratified and approved the publication at their June 1, 1979 meeting.

(5) The McDowell County Board of Commissioners did not violate any open meeting laws by discussing with the County Manager the newspaper in which to place the notice of tax lien sale while they were sitting in a public meeting as the Board of Equalization and Review.

(6) The bulletin board of the McDowell County Administration Building which is attached to the McDowell County Court House Building is a public place in the Court House as required by G.S. 105-369(d), and the posting of the notice of tax lien sale on such bulletin board was sufficient to meet the requirements of said statute.

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From a judgment based upon the foregoing findings and conclusions declaring that the publication of notice of tax lien sales for 1979 for McDowell County in *The Old Fort Dispatch*, and the actions of defendant county and the individual defendants in ordering and authorizing such publication, were valid and proper, and denying all claims for relief, plaintiffs appealed.

Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr., for plaintiff appellants.

Carnes & Little, by Stephen R. Little, for the defendant appellee Jayvee Publishing Company.

Story & Hunter, by Robert C. Hunter, for the remaining defendant appellees.

HEDRICK, Judge.

[1] Plaintiffs, by their first and third assignments of error, contend that the trial court erred in admitting evidence of the unpaid distribution of *The Old Fort Dispatch* and in relying upon such evidence in its findings of fact and conclusions of law. Plaintiffs argue that G.S. §§ 1-597 and 105-369(d) require that the newspaper publishing the notice of the tax lien sale must be one of "general circulation to actual paid subscribers," and that any evidence as to unpaid distribution or non-paid subscribers is therefore irrelevant to the determination of whether *The Old Fort Dispatch* satisfied the requirements of those statutes. While we agree that evidence of unpaid distribution might be irrelevant, we do not agree that the court relied upon such evidence in its findings and conclusions, and thus plaintiffs were not prejudiced thereby.

G.S. § 1-597 in pertinent part provides:

Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted . . . such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement

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or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; . . .

G.S. § 105-369(d) in pertinent part provides:

Notice of the time, place, and purpose of the tax lien sale shall be given by advertisement at some public place at the courthouse (in the case of county taxes) . . . and by advertisement once each week for four successive weeks preceding the sale in one or more newspapers having general circulation in the taxing unit

[2] We note at the outset that G.S. § 105-369(d), the statute most specifically designed to the instant situation, refers only to newspapers of “general circulation in the taxing unit,” while G.S. § 1-597, a more general statute, refers to newspapers “with a general circulation to actual paid subscribers.” When two statutes deal with the same subject matter, the statute which is addressed to a specific aspect of the subject matter takes precedence over the statute which is general in application unless the General Assembly intended to make the general statute controlling. *In re Greene*, 297 N.C. 305, 255 S.E.2d 142 (1979). In our view, the legislature intended to make G.S. § 1-597 controlling here, especially in light of the fact that the reference to “general circulation” was added to G.S. § 105-369(d) subsequent to the enactment of G.S. § 1-597. A newspaper publishing notices of tax lien sales must therefore be one with a “general circulation to actual paid subscribers.”

Plaintiffs’ contentions are based upon two exceptions. Exception No. 1 is set out in the record as follows:

Q. Now then, would you state to the Court whether or not copies of *The Old Fort Dispatch* are distributed to other locations in McDowell County for distribution other than sale?

OBJECTION, as to the relevancy of non-paid distribution.

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COURT: Overruled.

Exception No. 8 was made to the following finding of fact made by the court:

(13) The approximate total circulation of *The Old Fort Dispatch* in the Marion area each week, both through sales and through free distribution, is 345.

The statute clearly states that the newspaper publishing the notice must have a general circulation to its *actual paid* subscribers. Even if the evidence admitted as to non-paid subscribers, upon which the challenged finding is partially based, was declared to be irrelevant, that holding would not make any difference in the instant case since the court also made the following findings, which in turn were based upon competent evidence in the record as to the existence of actual paid subscribers:

(4) *The Old Fort Dispatch* has actual paid subscribers in McDowell County, North Carolina.

(5) Actual paid subscribers of *The Old Fort Dispatch*, who receive their copies of said newspaper by mail, live on all ten (10) rural postal routes in McDowell County.

(6) Actual paid subscribers of *The Old Fort Dispatch* receive their copies by mail at city addresses through all three post offices in McDowell County and at street addresses in both of the incorporated towns within McDowell County, as follows: 162 businesses and individuals in Old Fort, North Carolina; 4 individuals in Nebo, North Carolina; and 77 businesses and individuals in Marion, North Carolina.

These findings are sufficient in our view to support the court's conclusion with respect to actual paid subscribers. Plaintiffs have failed to show any prejudicial error, and these assignments of error are without merit.

Plaintiffs next contend, based upon their fifth and tenth assignments of error, that the court erred in concluding as a matter of law that *The Old Fort Dispatch* was a newspaper with a general circulation in McDowell County to actual paid subscribers and therefore qualified to publish the 1979 notice of the tax lien sale. We do not agree.

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[3, 4] Neither the General Statutes nor the courts of this State have addressed the meaning of the phrase "general circulation." Courts in other jurisdictions, however, when faced with the lack of a statutory definition, have explained this phrase in the following ways: A newspaper of general circulation is a publication to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinions, and advertisements, and thereby to render it probable that the "notice" would be brought to the attention of the general public. *In re Herman*, 183 Cal. 153, 191 P. 934 (1920). *See also Wahl v. Hart*, 85 Ariz. 85, 332 P.2d 195 (1958). Whether a newspaper is one of general circulation is not determined merely by the number of its subscribers, but by the diversity of those subscribers, and even if the newspaper is of particular interest to a particular class of persons, if it contains news of a general character and interest to the community, although that news may be limited in amount, the newspaper qualifies as one of general circulation. *Burak v. Ditson*, 209 Iowa 926, 229 N.W. 227 (1930). It is not required that the newspaper be one that is read by all the people in the county or district, *Lynn v. Allen*, 145 Ind. 584, 44 N.E. 646 (1896), nor is it required that it reach all the voters in the district, as long as it is reasonably calculated to give notice to the persons affected. *Barrett v. Cuskelly*, 52 Misc. 2d 250, 275 N.Y.S.2d 280 (1966), *aff'd*, 28 A.D.2d 532, 279 N.Y.S.2d 380 (1967). *See, generally*, 66 C.J.S. Newspapers § 4; 58 Am. Jur. 2d Newspapers, Periodicals, and Press Associations § 7.

[5] We have already established that the court made sufficient findings relative to *The Old Fort Dispatch* having actual paid subscribers in McDowell County. With respect to the *Dispatch* having a general circulation to these actual paid subscribers, the court made, in addition to the findings discussed heretofore, the following pertinent findings:

(17) The nature of the categories of items regularly contained within *The Old Fort Dispatch* include the following: current event news items that deal with Old Fort, McDowell County, and Marion; sports items that deal with teams from Old Fort, from McDowell County and from Marion; political columns from U.S. congressman and U.S. Senator Helms; religious items; social news of Old Fort, McDowell County, and Marion; historical features, including old pictures of persons and places in

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McDowell County under the heading of "Shades of Yesterday"; human interest features; general and miscellaneous features; humorous items, including jokes and cartoons; legal notices; classified advertisements; commercial advertising from businesses in and around Old Fort, businesses from various places in McDowell County, businesses in and around Marion, and businesses from outside McDowell County; public service announcements, including full page promotional advertisements for the McDowell County United Way Campaign, United States Savings Bonds, etc.; commercial news; and agricultural news.

(18) Several lawyers from McDowell County, North Carolina, have caused to be published various legal notices in *The Old Fort Dispatch*

(19) Legal notices have also been sent to *The Old Fort Dispatch* for publication and such notices have actually been published for the following non-lawyers: The North Carolina Department of Transportation, Western Carolina Telephone Company, Duke Power Company, the Sheriff of McDowell County, and non-lawyer individuals serving as executors and administrators of descendant estates.

. . .

(26) The areas of McDowell County, North Carolina having the greatest circulation of *The Old Fort Dispatch* Newspaper are the same which contain 72.6% of the registered voters of McDowell County, using figures of October, 1978.

(27) The population of McDowell County is 30,000.

. . .

(29) The masthead of *The Old Fort Dispatch* reads in part "Proudly serving Old Fort and McDowell County, North Carolina."

These findings, supported by competent evidence, indicate the following: *The Old Fort Dispatch* has actual paid subscribers in all parts of McDowell County; *The Old Fort Dispatch* contains a wide

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variety of news items and advertisements of importance to all citizens of McDowell County; *The Old Fort Dispatch* is not intended to serve any particular class of persons, and although the newspaper is published in Old Fort, the *Dispatch* does not merely cover items of interest to the Old Fort community; and the paid distribution of the *Dispatch* covers an area containing the bulk of the county's registered voters. These findings, in our view, provide sufficient support for the conclusion that *The Old Fort Dispatch* is a newspaper with a general circulation in McDowell County to actual paid subscribers.

While we realize that the court made other findings, especially in relation to the distribution of *The Old Fort Dispatch* for sale at various businesses throughout McDowell County and the free distribution of the newspaper to customers at other businesses, which would indicate a wider circulation of the *Dispatch*, such findings are not necessary to the conclusion that the *Dispatch* has a "general circulation to actual paid subscribers" and are therefore mere surplusage. We also realize that the number of actual paid subscribers of the *Dispatch* is small relative to the number of citizens of McDowell County; however, more specificity with respect to the minimum number of actual paid subscribers required for a newspaper to be of "general circulation" is a matter for the legislature and not for the courts.

We are also of the view that the court made sufficient findings, based upon competent evidence, to support its conclusion that *The Old Fort Dispatch* meets the other requirements of G.S. §§ 1-597 and 105-369(d) and therefore the *Dispatch* was qualified to publish the notice of McDowell County's 1979 tax lien sale. These assignments of error are without merit.

[6] Plaintiffs lastly contend, based on their sixth, seventh, eighth, and tenth assignments of error, that the trial court erred in concluding as a matter of law that the action of the county in authorizing publication of tax lien sale notices in *The Old Fort Dispatch* was proper and lawful. Plaintiffs argue that such an authorization could not lawfully be made by the county without formal action by the Board of County Commissioners in a public meeting, and since such formal action was not taken prior to the first publication of the tax lien sale notice in the *Dispatch*, the board acted unlawfully in contracting with the *Dispatch* for the publication. We disagree.

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G.S. § 105-369(a) in pertinent part provides:

On the first Monday in February in each year, each county tax collector . . . shall report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property, and the governing body shall thereupon order the tax collector to sell such tax liens at one of the times specified in subsection (b)

G.S. § 105-369(b) in pertinent part provides: "The county tax lien sale shall be held on the first Monday in March, April, May, or June"

G.S. § 105-369(d) in pertinent part provides: "Notice of the time, place, and purpose of the tax lien sale shall be given . . . by advertisement once each week for four successive weeks preceding the sale in one or more newspapers having general circulation in the taxing unit"

G.S. § 105-350 in pertinent part provides: "It shall be the duty of each tax collector: (1) To employ all lawful means to collect all property . . . taxes with which he is charged by the governing body"

The unchallenged findings show that the decision to publish the tax lien sale notice in *The Old Fort Dispatch* was made by defendant Hall, the county tax collector, and defendant Harmon, the county manager, who had discussed the matter informally with the McDowell County Board of Commissioners. As a result of this decision, an oral contract was made with *The Old Fort Dispatch* for publication of the notice. When he decided, along with the county manager, that the notice was to be published in the *Dispatch*, and then orally contracting for the publication, the county tax collector was merely performing one of the incidental and administrative duties associated with his carrying out the Board's directive pursuant to G.S. § 105-369(a) as to handling the sale of tax liens. Assuming *arguendo* that formal action by the county commissioners was necessary with respect to authorizing the publication of the tax lien sale notice in *The Old Fort Dispatch*, the action of the Board at its 1 June 1979 meeting ratifying the actions taken by the county tax collector would satisfy that requirement. The court properly concluded, based on the findings, that the county's actions were proper and lawful, and these assignments of error are without merit.

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The decision of the trial court is

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge CLARK dissents.

CLARK, Judge, dissenting:

The purpose of the requirements of G.S. 1-597 for “general circulation to actual paid subscribers” and of G.S. 105-369(d) for “general circulation in the taxing unit” is twofold: (1) to give reasonable notice to the owners of property subject to the tax lien, and (2) to apprise prospective purchasers of the sale.

Old Fort is a small town in western McDowell County, about six miles from the county’s western boundary. Assuming that voter registration reflects accurately the population, Old Fort Township has about 11.7% of the estimated 30,000 county population. More than half of the county population is concentrated in Marion, the county seat located in the approximate center of the county and about 10 miles east of Old Fort. The record on appeal indicates a paid circulation of 499 copies, 382 copies in Old Fort Township, and 117 copies in the remainder of the county with 88.3% of the population.

I agree with the majority that findings of fact (4), (5), and (6) are supported by the evidence. I note, however, that these findings do not include any facts relating to the number of subscribers or circulation. I do not agree with the majority that findings (17), (18), (19), (27), and (29) support the conclusion that *The Old Fort Dispatch* has general circulation. Finding (26) apparently links Old Fort to Marion, 10 miles away and having minuscule circulation of the *Dispatch*, so as to reach the misleading finding that “the areas . . . having the greatest circulation of *The Old Fort Dispatch* Newspaper are the same which contain 72.6% of the registered voters . . .” The elimination of irrelevant and misapplied facts leaves little or nothing to support the judgment.

I cannot accept such a miserably low standard for the requirements of G.S. 1-597 and G.S. 105-369(d), which are designed primarily to protect the due process rights of the defaulting tax lister.

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CLOTELLE M. FISHER v. CARRIE McDANIEL THOMPSON

No. 8026SC503

(Filed 3 March 1981)

1. Evidence § 29.2— investigating officer's accident report — exclusion not prejudicial to plaintiff

In an action to recover for injuries sustained by plaintiff in an automobile accident, the accident report prepared by the investigating officer in the normal course of his employment qualified for admission under the hearsay exception for entries made in the regular course of business; however, the trial court's exclusion of portions of the accident report was not prejudicial to plaintiff, since plaintiff sought to introduce portions of the report concerning an eyewitness's statement to the officer that defendant ran the red light and concerning the name of the person who was given a ticket for running the red light; the eyewitness subsequently testified repeatedly that defendant had run a red light while plaintiff's light was green; and defendant admitted in her testimony that the officer had given her a ticket for running the red light and that she had pled guilty to the charge in a subsequent court appearance.

2. Automobiles § 45— injury sustained in automobile accident — evidence not prejudicial

In an action to recover for injuries sustained by plaintiff in an automobile accident, plaintiff failed to show that she was prejudiced by defense counsel's introduction of irrelevant testimony tending to show (1) what treatment plaintiff had received for her injury from an earlier automobile accident, since that evidence related to the issue of damages, not liability, which the jury did not reach by reason of its conclusion that plaintiff was contributorily negligent; (2) that plaintiff had received her full salary during her absence from work as a schoolteacher because she had sick leave, though that evidence violated the collateral source rule, since that evidence, too, concerned only the issue of damages; (3) that plaintiff's counsel in this action had also represented her with respect to her claim arising out of the earlier automobile accident, and counsel stipulated to the court in the presence of the jury that he had represented plaintiff in the earlier action; and (4) the amount of settlement plaintiff received for the earlier accident, since the jury was not even in the courtroom during this part of plaintiff's testimony.

3. Evidence § 34.1— plaintiff's statement against her interest — admissibility of hearsay evidence

In an action by plaintiff to recover for injuries sustained in an automobile accident, the trial court did not err in allowing defendant to testify that he heard plaintiff tell a third person at the hospital that she was "going to get a lot of money out of this accident," since plaintiff's statement was sufficiently against her interest to qualify as an admission of a party-opponent; in addition, defendant's further testimony that plaintiff told the third person in the hospital that defendant was in the wrong could not have prejudiced plaintiff's case, since it actually reinforced defendant's previous admission that she had been given a ticket for

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running a red light.

4. Automobiles § 79— intersection accident — sufficiency of evidence of contributory negligence

In an action to recover for injuries sustained by plaintiff in an automobile accident at an intersection, the trial court did not err in refusing to set aside the verdict finding plaintiff contributorily negligent where both plaintiff and an eyewitness testified that defendant caused the collision by running a red light; defendant admitted she was given a ticket for this and pled guilty to the charge; she nevertheless repeatedly denied that she had actually run the light but testified that a slow-down in her lane of traffic had caused her to be caught under the light as it turned red; and defendant also elicited some evidence from the eyewitness indicating that plaintiff may have been speeding when she crossed the intersection.

APPEAL by plaintiff from *Riddle, Judge*. Judgment entered 7 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 January 1981.

Plaintiff brought a negligence claim for injuries she sustained in a two-car collision. The jury found that, though defendant was negligent, plaintiff was contributorily negligent and was not, therefore, entitled to recover any damages in this action.

Plaintiff presented the following evidence. Plaintiff and defendant were involved in an automobile accident on 22 March 1976 at the intersection of Stonewall Street and Church Street in Charlotte. Plaintiff was driving a Plymouth, and defendant was driving a 1973 Oldsmobile. The accident was reported to the police department at 3:15 p.m., and Officer E. Smith, Jr., arrived at the scene five minutes later. Officer Smith did not have an independent present recollection of this particular accident or what occurred during his investigation of it. He was, however, permitted to testify, in part, using the written accident report he filled out concerning these events:

Vehicle number one is Mrs. Thompson, the Defendant. Vehicle number two is Mrs. Fisher. Reading from the report, driver of vehicle number one stated she was headed west on Stonewall Street, and that she thought the light in her direction of travel was green. The driver of vehicle number two stated that the light in her direction of travel was green, and that the driver of vehicle number one ran the red light.

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Officer Smith also stated that he had given a ticket in connection with the accident.

Defendant testified as an adverse witness for plaintiff. Defendant admitted that Officer Smith had given her a ticket for running a red light on this occasion. She pled guilty to the offense in court on 15 April 1976. Defendant, however, denied that the accident was her fault and stated that she had started across the intersection while her stoplight was green. Then she had to stop in a line of traffic: "I got caught under the light. I didn't say I had crossed the street. I say the impact took place here in the intersection."

Roy Kevin Dawkins was in the car behind plaintiff. His eyewitness testimony as to how the accident occurred contradicted defendant's version.

We were stopped at the light, both of us. I was behind her [plaintiff]. I was looking around as the light turned green. She proceeded on and I proceeded on, and at the time she did she was struck.

... The Defendant's light was red when we started into the intersection because ours was green. ...

... I heard the Defendant testify that there was a car ahead of her that had her stopped out in the intersection. I didn't see that car. There were not any cars ahead of us in the intersection prior to the accident because I was directly behind her [plaintiff] and she was the front car at the light.

Plaintiff's own testimony did not vary from that of Mr. Dawkins. She stated that she began to cross the intersection while the light facing her was green. Then she saw "[defendant's] car coming. There's a kind of a hill there. This car was approaching me. No, I didn't see that car stop at any time at all. It was in motion the whole time." Plaintiff then testified more specifically about her injuries, pain and the type of treatment she received from Dr. Carlisle after the accident. She admitted that she had been in another car accident only a short while before but insisted that injuries from the prior accident mainly affected her neck while the instant injuries concerned her back. Dr. Carlisle, as an expert in the field of chiropractic, testified about the extent and nature of plaintiff's injuries and the treatment she received after the accident on 22 March 1976.

Thomas T. Downer and John B. Walters, for plaintiff appellant.

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Walker, Palmer and Miller, by James E. Walker and Raymond E. Owens, Jr., for defendant appellee.

VAUGHN, Judge.

Plaintiff brings forward many assignments of error regarding evidentiary matters at trial and the judge's refusal to set aside the verdict. At the outset, we must cite plaintiff's counsel with multiple violations of the Rules of Appellate Procedure. Exceptions nos. 6, 18, 37, 42, 43, 44, 45, 46 and 48 are deemed abandoned because they are not supported in the brief with some reason, argument or authority. App. R. 28(b)(3). Arguments in support of Exception no. 40 cannot be considered since it is not made the basis of an assignment of error in the record, App. R. 10(c), and it is not set out in the brief, App. R. 28(b)(3). Exceptions nos. 48, 49 and 50 are also abandoned because they are not set out in the brief. Finally, arguments supporting exceptions nos. 8, 9, 10, 11, 12 and 13 on the ground of irrelevancy must be ignored because they are not assigned as error in the record on this basis, nor are they appropriately set out in the brief under the pertinent issue. App. R. 10(c), 28(b)(3). We shall now examine the exceptions which were properly preserved for appellate review.

[1] First, plaintiff argues that the court should have allowed the investigating officer to read to the jury the accident report in its entirety. Officer Smith testified that he prepared the report in the normal course of his employment and that it was standard procedure to do so shortly after investigating an accident. He authenticated the report by identifying the handwriting thereon as his own. Thus, it appears that the contents of the report qualified for admission under the hearsay exception for entries made in the regular course of business. *See* 1Stansbury, N.C. Evidence § 155 (Brandis rev. 1973); *see generally* Annot., 77 A.L.R. 3d 115 (1977). In *State v. Connley*, the Court held that oral dispatches from a trooper to the Virginia State Police control station were admissible in the same way written entries in the regular course of business were but noted that:

[the] portion of these dispatches which reported defendant's threat to kill Fisher [trooper] if anyone attempted to impede their progress to Atlanta is a classic example of "double hearsay". "[T]here is no good reason why a hearsay declaration, which

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within itself contains a hearsay statement, should not be admissible to prove the truth of the included statement, if both the statement and the included statement meet the tests of an exception to the hearsay rule.

295 N.C. 327, 344-45, 245 S.E. 2d 663, 673-74 (1978), *modified on other grounds*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954 (1979).

Here, the judge excluded the portion of the accident report which recorded Dawkins' statement that defendant ran the red light. Plaintiff suggests that the evidence was admissible as *res gestae*. We must disagree. Even though the officer arrived on the scene within five minutes of the accident, that lapse of time is sufficient to remove the statement from the realm of spontaneous utterances. *See State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979); *Gray v. Insurance Co.*, 254 N.C. 286, 118 S.E. 2d 909 (1961); *State v. Murray*, 21 N.C. App. 573, 205 S.E. 2d 587 (1974). Dawkins' statement to Officer Smith as recorded in the report was "hearsay within hearsay"; nevertheless, it was probably competent as past recollection recorded. Officer Smith remembered filling out the report, but said he had no present independent memory of the events or conversation contained therein apart from the writing itself. Without question, the requirements for admission as past recollection recorded were met. *See* 1 Stansbury, N.C. Evidence § 33 (Brandis rev. 1973). In *State v. Holloway*, our Court applied this rule of evidence to permit "a police officer to testify on rebuttal from police notes typed by a third person some three months after the alleged homicide and to read from the police records alleging statements that the defendant had made." 16 N.C. App. 266, 271, 192 S.E. 2d 75, 79 (1972). The accident report in this case is certainly more trustworthy since it was in the officer's own handwriting and had been prepared shortly after the investigation. Moreover, it is significant that the Court in *Holloway, supra*, did not even discuss the possibility of a double hearsay problem and admitted the entire police record, including statements made by defendant, as past recollection recorded.

As a general matter then, the accident report should have been admitted. This error does not, however, require a new trial unless plaintiff's case was adversely affected by the exclusion. G.S. 1A-1, Rule 61. The critical portions of the report which plaintiff sought to

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introduce were: (1) the eyewitness's statement to the officer that defendant ran the red light and (2) the name of the person who was given a ticket for running a red light. We hold that the record demonstrates that plaintiff did not suffer any prejudice.

In his direct testimony, Dawkins confirmed that he had talked with the officer and, consistent with that prior statement, affirmatively and repeatedly testified that defendant had run a red light while plaintiff's light was green. In addition, it appears, on page 43 of the record, that the judge later repented from his earlier ruling excluding that portion of the report recording Dawkins' statement. Plaintiff's counsel read the following to the jury:

MR. DOWNER: From the police officer's report:
"The witness stated he was behind the vehicle and that vehicle number 1 ran the red light." That was the only part we wanted to get in. That was from the official report at the time of the accident.

It is obvious that no prejudicial error was committed in this regard.

It is equally clear that the judge acted properly when he refused to allow Officer Smith to read from the accident report the name of the person cited for a traffic offense. The following developed during the direct examination of the officer:

I did have an opportunity to make any arrests or give any tickets or citations at the time of this accident.

A. I cited Mrs. Fisher.

A. Correction.

MR. WALKER: OBJECTION.

COURT: OVERRULED.

A. Mrs. Frazier. Correction.

Q. Well, strike that question, strike that question.

There's a mistake on the report.

MR. WALKER: Well, I OBJECT to him saying there's a mistake on the report.

Q. Well, okay, go ahead and read it, the name that you have under the arrest.

A. On the arrest—

MR. WALKER: Well, I OBJECT to him reading anybody's name under the arrest.

COURT: SUSTAINED.

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Plaintiff has no grounds for complaint. Her own counsel requested that his question, asking the name of the person that had been given a ticket, be stricken because of the apparent mistake on the report. It was, in fact, beneficial to plaintiff that Officer Smith was not permitted to testify further on this point. Plaintiff, nevertheless, contends on appeal that the officer should have been allowed to correct the mistake on the report. The excerpt from the record, *supra*, shows that no such request was made at trial. Plaintiff, in her brief, has not cited any authority for the proposition that a witness, who has no present memory of an event apart from a writing, may correct a portion of that writing in his oral testimony. The theory supporting admission of the accident report, as a business record or past recollection recorded, is that a written account of an event entered by a witness at a time near to that of the occurrence is inherently trustworthy and reliable. It would, therefore, be incongruous to hold that Officer Smith, who did not have a present recollection of the accident, should have been permitted to correct an alleged mistake on the report. Even if an oral correction of a written report were proper, plaintiff could not have been prejudiced by its exclusion since defendant admitted in her testimony that the officer had given her a ticket for running a red light and that she had pled guilty to the charge in a subsequent court appearance.

[2] Plaintiff next argues that defense counsel improperly elicited irrelevant testimony on several occasions. To receive a new trial on this ground, plaintiff must demonstrate the following: (1) that the evidence did not have *any* logical tendency to prove a fact in issue and (2) that its improper admission misled the jury or prejudiced her case. *See State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); 1 Stansbury, N.C. Evidence § 77, at 234-35 (Brandis rev. 1973). The two-part test for a new trial has not been met in this case.

On cross-examination, plaintiff was asked what treatment she had received for her injury from the earlier automobile accident in February. We cannot say that a description of her prior treatment lacked any tendency to prove a fact in issue: to wit, whether the injuries, for which she was presently seeking damages from defendant, were proximately caused by the March accident. Plaintiff contended at trial that only her neck was injured in February and that her back injuries were entirely due to the wreck involving defendant in March. The same chiropractor, Dr. Carlisle, treated

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plaintiff in connection with both incidents. A comparison of the types of treatment she received after each accident tended to present some evidence to the jury from which it might have inferred that the March accident had caused, at most, an aggravation of preexisting injuries. In addition (as is true with other evidence to which plaintiff takes exception, *infra*), this evidence, even if improperly admitted, could not have prejudiced her case since it related to the issue of damages, not liability, which the jury did not reach by reason of its conclusion that plaintiff was contributorily negligent.

Plaintiff also objected to questions about whether she had received her full salary, during her absence from work as a school-teacher, because she had sick leave. She contends that evidence of her sick leave pay violated the collateral source rule. We agree. "Evidence of plaintiff's receipt of benefits from his injury or disability from collateral sources generally is not admissible to reduce his claim for damages." 1 Jones, Evidence § 4.48, at 480-81 (6th ed. 1972). The majority rule excludes evidence of the wages, salary or commissions paid to the plaintiff by an employer during the period of disability, regardless of whether such payments were gratuitous or in discharge of a legal obligation. Annot., 7 A.L.R. 3d 516, 520 (1966). A tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source. We believe that proper enforcement of this policy requires that sick leave benefits be included within the protection of the collateral source rule. Authority in other jurisdictions supports this view. 7 A.L.R. 3d 516, *supra*, at 120 (Supp. 1980). Even though this evidence concerning plaintiff's sick leave was irrelevant, the error was not prejudicial because it, too, only concerned the issue of damages.

Plaintiff was asked several times whether her present counsel, Mr. Downer, had also represented her with respect to the claim arising out of the February accident. This was not germane to any of the facts in issue. Nevertheless, the error was harmless, and it appears that counsel waived his objections by stipulating to the court, in the presence of the jury, as follows:

Your Honor, I will stipulate that I represented Mrs. Fisher and consulted with her concerning the accident in February, the automobile accident she had on February 10th. I will also stipulate that I also represented her in the

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accident that she had on March 22nd. I hope that I'm her family lawyer.

Exceptions nos. 29, 30, 31, 32, 33 and 34 are, therefore, overruled. Defense counsel also questioned plaintiff about the amount of the settlement she received for the February accident. Of course, this was improper and totally irrelevant to the claim concerning the March wreck. Plaintiff's exceptions on this point are not, however, well taken. The record before us (pages 39 and 40) discloses that the jury was not even in the courtroom during this part of her testimony. Plaintiff's case could not have been affected by it, and exceptions nos. 35 and 36 are overruled. The question asking Dr. Carlisle how much he charged plaintiff for treating her injuries from the February accident was not irrelevant. He stated that he charged her \$232.00 in connection with the first accident and approximately \$700.00 for treatment of injuries from the second one. Since he treated her for both accidents, this testimony was related to the issue of damages in that it tended to show whether the medical expenses being claimed by plaintiff as part of her total compensation were reasonable.

Plaintiff next contends that defense counsel improperly used leading questions. On cross-examination of his own client (who had been called as an adverse witness for plaintiff), defense counsel asked two leading questions (see exceptions nos. 9 and 10). The general rule is that leading questions may be asked on cross-examination, but the cross-examiner may be barred from doing so "when the witness is not in fact unwilling or hostile." 1 Stansbury, N.C. Evidence § 31, at 84 (Brandis rev. 1973). Even so, the rulings of the judge on the use of leading questions are discretionary and may not be reversed absent an abuse of that discretion. *Id.* at 85. No such abuse exists here. In addition, we specifically find that the questions identified by exceptions nos. 8 and 11 are not leading and that exceptions nos. 12 and 13 could not have been taken to the form of the questions.

[3] We shall now consider plaintiff's contentions about the improper admission of hearsay testimony. Defendant was allowed to testify to the following:

I was sitting over there at the hospital talking, I heard the Plaintiff say that she didn't have to worry about this accident, that they said I was in the wrong.

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Q. She said that the other person didn't have to worry about it because of what?

A. Because the officer said that I was in the wrong, and she was going to get a lot of money out of this accident.

MR. DOWNER: OBJECTION.

COURT: OVERRULED.

Q. She mentioned having been in another one?

MR. DOWNER: OBJECTION.

COURT: OVERRULED.

Q. Did she have any conversation with someone in your presence about any other accident other than this one?

A. The third party —

MR. DOWNER: OBJECTION.

COURT: OVERRULED.

Q. Go ahead.

A. She had, with the third party. They were talking.

Q. What did you hear the third party say to the Plaintiff.

MR. DOWNER: OBJECTION.

COURT: OVERRULED.

Q. Go ahead.

A. He told her that she had been in an accident not long ago, and that's the second car she had torn up.

MR. DOWNER: OBJECTION. Move to strike.

COURT: Denied.

Q. Go ahead.

A. He told her not to worry about it, she was going to get some money out of this.

MR. DOWNER: OBJECTION. Move to strike.

COURT: Denied.

It is clear that defendant had already begun testifying about the content of plaintiff's conversation with a third party before counsel interposed his first objection to this line of questioning. Nevertheless, we have considered the substance of plaintiff's objections and find that they were all properly overruled.

As a general matter, the declarations of a party to a suit, if pertinent and not subject to exclusion by a specific rule, are always admissible against him. *State v. Willard*, 293 N.C. 394, 404, 238 S.E. 2d 509, 516 (1977); *Stone v. Guion*, 222 N.C. 548, 550, 23 S.E. 2d

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907, 908 (1943); *Tredwell v. Graham*, 88 N.C. 208, 216 (1883). To be admissible, a party's utterances need not have been against his interest when made. *State v. Cobb*, 295 N.C. 1, 14, 243 S.E. 2d 759, 766-67 (1978). Plaintiff's statement, that she would get a lot of money out of the accident, was, however, sufficiently against her interest to qualify as an admission of a party-opponent. The rationale for this exception to the hearsay rule is that it would be illogical "to permit a party to object to the reception of *his own* declarations on the ground of hearsay." 2 Stansbury, N.C. Evidence § 167, at 6 (Brandis rev. 1973). It would, therefore, be inappropriate to exclude what plaintiff said as hearsay. We note, in addition, that defendant's testimony that plaintiff told the third party that *defendant* was in the wrong could not have prejudiced *plaintiff's* case since it actually reinforced defendant's previous admission that she had been given a ticket for running a red light.

The introduction of the third party's statement, through defendant's testimony, that this was the second car plaintiff had "torn up," was also not objectionable. The statement was not offered to prove the truth of the matter asserted, but only for the mere purpose of showing that the statement was made. Declarations offered for nonhearsay purposes are always admissible. See *Spillman v. Hospital*, 30 N.C. App. 406, 227 S.E. 2d 292 (1976); 1 Stansbury, N.C. Evidence § 141 (Brandis rev. 1973). Moreover, even if we were to assume that the statement should have been excluded, the error would not have been prejudicial since plaintiff later testified, at length, about the earlier accident in February. In sum, we question the sincerity of plaintiff's concern with this testimony on appeal since she made no attempt whatsoever to discredit it at trial, though she was free to rebut any of its possible implications in her later testimony.

Plaintiff also claims that a question asking her what injury she sustained in the prior accident was improper hearsay. We disagree. The classic definition of hearsay is that "[e]vidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person *other than the witness* by whom it is sought to produce it." *Chandler v. Jones*, 173 N.C. 427, 428, 92 S.E. 145, 146 (1917) (emphasis added). Plaintiff was obviously qualified to give a general description of her injuries, and such testimony cannot be characterized as hearsay. The exception to the question about the number of x-rays done by Dr. Carlisle has no merit since plaintiff did not answer it.

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Dr. Carlisle testified as a medical expert in the field of chiropractic for plaintiff. He stated that he requested an orthopedic surgeon, Dr. McBryde, to examine plaintiff and x-ray her lower back. An objection by defendant to the following question was sustained: "What if anything, did Dr. McBryde confer with you on concerning this accident?" Plaintiff contends that the question should have been allowed and cites *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). In *Booker*, the Court held that it was not error to permit a testifying doctor to base his opinion in part on a medical history received from another treating physician. The Court reasoned that "medical information obtained from a fellow-physician who has treated the same patient [is] 'inherently reliable.'" *Id.* at 479, 256 S.E. 2d at 202. On the record before us, we hold that *Booker* is inapposite. Strictly speaking, the question asked Dr. Carlisle what Dr. McBryde *said* and was not a request for him to form an opinion based on information received from another treating physician. In any event, we could not sustain an exception to the exclusion of evidence when the record does not disclose what that excluded evidence would have been. *State v. Hedrick*, 289 N.C. 232, 237, 221 S.E. 2d 350, 354 (1976); *Service Co. v. Sales Co.*, 259 N.C. 400, 411, 131 S.E. 2d 9, 18 (1963).

[4] Plaintiff's final assignment of error is to the judge's refusal to grant her motion to set aside the verdict as being against the greater weight of the evidence. This motion is addressed to the judge's sound discretion, and we may not reverse his ruling thereon unless a manifest abuse of discretion is shown. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); *see also Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E. 2d 511 (1980). Both plaintiff and an eyewitness testified that defendant caused the collision by running a red light. Defendant admitted she was given a ticket for this and pled guilty to the charge. She, nevertheless, repeatedly denied that she had actually run the light but testified that a slow-down in her lane of traffic had caused her to be caught under the light as it turned red. Defendant also elicited some evidence from the eyewitness indicating that plaintiff may have been speeding when she crossed the intersection. Viewed in this light, the judge did not abuse his discretion in refusing to set aside the jury's verdict which was duly rendered upon sufficient competent evidence.

We conclude the trial was free from prejudicial error and

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overrule all assignments of error.

No error.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. BOBBY L. BYRD

No. 8010SC907

(Filed 3 March 1981)

1. Criminal Law § 92.3— consolidation of charges against one defendant

The trial court did not err in consolidating for trial charges against defendant for assault with a deadly weapon on a law officer in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries not resulting in death and charges against defendant for breaking and entering a restaurant, breaking and entering another building and larceny from the second building where the assaults occurred when the officer attempted to arrest defendant while defendant was fleeing from the scene of the other crimes, since all of the charges against defendant were based on the same series of acts or transactions connected together within the meaning of G.S. 15A-926(a).

2. Criminal Law § 26.5; Constitutional Law § 34— assault charges involving law officer — no double jeopardy — no election required — arrest of judgment in one case

Defendant was not placed in double jeopardy by his trial on charges of assault upon a law officer with a firearm while he was in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, and the State was not required to elect between the two assault charges. However, where defendant was convicted upon both charges, judgment must be arrested in the case charging the defendant with the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties.

3. Criminal Law §§ 75.13, 169.3— statements by defendant to third persons — similar testimony admitted without objection — harmless error

The admission over objection of an officer's testimony concerning statements he heard defendant make to third persons while defendant was in custody but under treatment in a hospital emergency room did not constitute prejudicial error where a second officer who overheard the statements was allowed to give similar testimony without objection.

4. Criminal Law § 73— hearsay testimony

The trial court properly sustained an objection to the question "What did you say to him and what did he say to you?" since the question was designed to elicit

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hearsay testimony.

5. Criminal Law § 101.4— exhibits taken to jury room — absence of objection

Defendant waived objection to the action of the trial court in permitting the jury to take into the jury room an item which had been introduced into evidence by failing to enter an objection or otherwise indicate his lack of consent at the trial.

6. Criminal Law § 162— necessity for objection to evidence

The trial court did not err in the denial of defendant's oral motion to suppress his clothing made at the conclusion of an officer's testimony where defendant failed to object to the officer's testimony describing defendant's clothing and the circumstances under which he obtained the clothing and failed to object when the clothing was offered into evidence.

7. Criminal Law § 101.2— refusal to question jurors about newspaper article

The trial court did not abuse its discretion in the denial of defendant's motion to examine the jurors as to whether they had read a newspaper article pertaining to defendant's trial and stating that defendant was a prison parolee where there was no evidence that any juror had read or heard about the article in question.

8. Burglary and Unlawful Breakings § 5.9; Larceny § 7.8— breaking and entering and larceny — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for breaking and entering a restaurant and a loan company and larceny of property from the loan company where it tended to show that within minutes after a police officer responded to an activated burglar alarm at the loan company at 3 a.m., defendant was seen in a parking lot at a point near the rear entrances to the restaurant and the loan company; defendant immediately began to run from the scene; officers discovered that both businesses had been forcibly entered and goods had been removed from the loan company; after officers apprehended defendant, they found a work glove in defendant's clothing similar to another work glove found at the scene of the break-ins; defendant's clothing contained dust particles similar to those found inside the premises of the break-ins where a brick wall between the two businesses had been broken open to allow passage from the restaurant to the loan company; during defendant's flight from the scene, he violently resisted apprehension and arrest; and defendant made incriminating statements at a hospital after his arrest in which he recognized that he had been in the parking lot behind the restaurant and loan company.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 23 May 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1981.

In four indictments, defendant was charged with breaking and entering of a restaurant, and breaking, entering and larceny from another building, assault upon a law enforcement officer with a deadly weapon while the officer was performing his duties, and

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assault of the same officer with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. Upon a plea of not guilty, defendant was tried before a jury and found guilty of breaking and entering the restaurant, breaking or entering and felonious larceny from the other building, assault on a law enforcement officer with a deadly weapon while in the performance of his duty, and assault with a deadly weapon inflicting serious injury. From sentences imposing imprisonment, defendant appeals.

The State's evidence tended to show that in the early morning hours of 17 February 1980, a burglar alarm at the Reliable Loan Company, a pawnshop in Raleigh, was activated. Responding to the alarm, several police officers arrived on the scene. Officer L. H. Knight observed the front part of the store while Officer J. R. Fluck investigated the rear of the store where there was a parking lot. As Officer Fluck pulled his patrol car into the parking lot and directed his headlights on the building, a tall black male, the defendant, ran in front of the car. Officer Fluck radioed to Officer Knight that he had a subject running out of the parking lot, and Officer Fluck gave chase. Although defendant eluded Officer Fluck, Officer Knight joined the pursuit on foot. When Officer Knight caught up with the defendant, defendant turned and hit Knight in the head. Knight wrestled defendant to the ground and as they struggled defendant attempted to grab Knight's service revolver which had been strapped in Knight's holster. Knight grabbed the cylinder of the revolver as defendant succeeded in removing the gun from its holster. As they struggled for possession with defendant maintaining a normal shooting grip on the weapon, the gun fired, striking Knight in the chest. Knight gained possession of the revolver as he fell after the shot. As defendant started away, Knight yelled "halt", fired one shot in the air, and then shot defendant. At that point, Officer Fluck arrived and arrested defendant.

At the hospital where defendant was taken for treatment of his gunshot wound, Officer Fluck and another officer overheard a conversation between defendant and two women who appeared to be defendant's mother and wife. One of the women asked if defendant knew he had shot a policeman and defendant responded in the affirmative. The woman asked if defendant had been caught coming out of the building, and defendant answered, "No, they got me in the parking lot."

Further evidence for the State indicated that both the Reliable

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Loan Company and the adjacent restaurant, the Charcoal Flame Restaurant, had been broken into that night, and that numerous items of personal property had been taken from the Reliable Loan Company. Analysis of defendant's clothing revealed dust similar to that found at the scenes of the break-ins.

Defendant introduced evidence that at the hospital his family inquired only of his health.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

Dean & Dean, by Joseph W. Dean, for the defendant appellant.

WELLS, Judge.

[1] Defendant first assigns as error the trial court's granting, over his objection, of the State's motion that all the charges against defendant be joined for trial. As grounds for its motion, the State asserted that all of the charges against defendant were based on the same act or series of acts or transactions connected together or constituting part of a single scheme or plan. *See* G.S. 15A-926 (a).¹ Defendant argues that joining the assault charges resulted in inflaming the jury against defendant with respect to the breaking and entering and larceny charges; that the assault on Officer Knight was a separate incident; and that evidence of the assault would not necessarily be relevant in a separate trial on the other charges.

Defendant contends that in order for joinder to be non-prejudicial, there must be a common scheme or plan underlying or connecting the various charges. We do not agree. The statute allows for joinder not only of charges based on a series of acts or transactions constituting parts of a single scheme or plan, but also those based on a series of acts or transactions connected together. We hold that defendant, who was fleeing from the scene of one of the other crimes with which he was charged and who assaulted an officer attempting to apprehend, detain, or arrest him while in such flight, was engaged in a series of acts or transactions connected together

¹ §15A-926. Joinder of offenses and defendants.—

(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

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within the meaning of G.S. 15A-926(a). Under these circumstances, the offenses were not so separate in time or place or so distinct in circumstances as to render a consolidation unjust or prejudicial to defendant. *See State v. Street*, 45 N.C. App. 1, 262 S.E. 2d 365, *cert. denied*, 301 N.C. 104, 273 S.E. 2d 309 (1980); *State v. Johnson*, 280 N.C. 700, 187 S.E. 2d 98 (1972). Ordinarily, a motion for joinder under G.S. 15A-926 is addressed to the sound discretion of the trial judge, and his ruling will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Greene*, 294 N.C. 418, 421-22, 241 S.E. 2d 662, 664 (1978), *See also State v. Brown*, 300 N.C. 41, 45-46, 265 S.E. 2d 191, 194-95 (1980). There being no abuse of discretion here, this assignment is overruled.

[2] Defendant next assigns as error the submitting of both assault charges to the jury, arguing that defendant was twice put in jeopardy for the same offense and that the State should have been required to elect between the two assault charges. We do not agree. *See State v. Partin*, 48 N.C. App. 274, 279-80, 269 S.E. 2d 250, 253-55 (1980). Although it was not error to charge and try defendant for both offenses, the constitutional guarantee against double jeopardy protects defendant from multiple punishment for the same offense. The elements of the assault upon Officer Knight, a law enforcement officer, with a firearm while he was in the performance of his duties are all included in the offense of assault upon Officer Knight with a deadly weapon inflicting serious injury. *State v. Partin, supra*, at 280-82, 269 S.E. 2d at 255. This requires us to arrest judgment in the assault conviction in 80CRS8961A for violation of G.S. 14-34.2.

[3] Defendant next assigns as error the admission, through the testimony of two police officers, of several statements made by defendant and overheard by the police officers while defendant was in custody but under treatment in the hospital emergency room. This testimony was first offered through Officer J. R. Fluck. On defendant's objection, the trial court conducted a *voir dire*, made findings of fact and overruled defendant's objection. Officer Fluck testified as follows:

During the period of time that I was in the Emergency Room with him I was approximately six to eight feet from the defendant. There were statements made by persons to him while I was in the Emergency Room in his presence. I was able to hear and understand some of those statements and some I

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was not. While the physicians and emergency personnel, what have you, were attending him when he first came in, they converged on [him] so that they completely surrounded him while attending him. I stepped back as far in the room as I could without leaving the room. There was mumbling going on amongst them while they were treating him. I did not make out what that was.

There was [*sic*] several people talking at one time and going back and forth and what have you and I didn't pay attention to it as it wasn't important to me. During the period of time I was in the Emergency Room with the defendant I did hear him make statements later on. I was able to hear and understand those statements. During that period of time in the Emergency Room some non-medical personnel entered the area and engaged in a conversation with the defendant. I do not know positively who those persons were. After the emergency medical people left the room, approximately a half hour after he arrived, a doctor came in and spoke with him for a minute, and a nurse came in and spoke with the doctor, and the two of them went out. And approximately a minute went by and two black females came in, one noticeably older than the other. And they engaged in a conversation with the defendant. I heard that conversation. There was a conversation about concern for the patient's health and feeling, and what have you. I did not pay it any attention. Something that struck my attention was when the older black female began to ask questions which appeared to me to be — the older black female asked the defendant if — said, do you know you shot a policeman? The defendant replied "yes." The younger black female asked, "did they catch you in the building?" The defendant replied, "no." The older black female asked, "did they catch you coming out of the building?" The defendant replied, "No, they got me in the parking lot." The younger — at that point I was took [*sic*] the statement (rest of answer stricken). After the defendant's statement about "no, in the parking lot," I turned my head to Officer Mason to look at him. And he looked at me, and I could not state fully who made the next statement, but it was a female voice. The statement that I heard next was, "be quiet." And after that there was a pause and the two black ladies and the defendant engaged in casual conversation about feeling, health, how he felt, and continued on like that.

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Officer Fluck had previously testified that at the time the conversations took place, defendant appeared to be coherent, unexcited, in a full state of mind, and fully aware of his physical and "mental" surroundings, and that defendant made lucid responses to unsolicited questions. The record discloses that a later witness, Officer B. H. Mason, who was present with Officer Fluck in the emergency room when the conversations took place, was allowed without objection to testify as to these self-same conversations and statements. The admission of testimony over objection is ordinarily harmless when testimony of like import is thereafter introduced without objection. *State v. Greene*, 285 N.C. 482, 496, 206 S.E. 2d 229, 238 (1974). If it was error to admit Officer Fluck's testimony as to these conversations, it was cured by the admission of Officer Mason's testimony of the same import without objection. See *State v. Chapman*, 294 N.C. 407, 413, 241 S.E. 2d 667, 671 (1978); 1 Stansbury's N.C. Evidence § 30, at 79 (Brandis rev. 1973).

[4] Defendant also assigns as error the refusal of the trial court, upon objection by the State, to allow defendant's wife to testify as to the conversation in the hospital emergency room. The question to which the State objected was as follows: "What did you say to him and what did he say to you?" Defendant argues that he was entitled to the wife's answer to this question to rebut the testimony of officers Fluck and Mason as to the content of the conversation. The question, as phrased, was designed to elicit hearsay testimony, and as phrased, the trial court properly sustained the objection. Of course, defendant could have testified in rebuttal to give his version of what he said to his wife and mother in the presence of the officers, but defendant did not choose to testify. Later in the trial, defendant's wife was recalled and allowed to testify that at the time she was at the hospital neither she nor her mother-in-law had any conversation with defendant concerning buildings. Counsel for defendant then asked Mrs. Byrd the following question: "[D]id you say to Mr. Byrd did they catch you coming out of the building?" Objection by the State was properly sustained. The question was leading and was designed to elicit testimony redundant to and repetitive of testimony previously given. Under these circumstances, it was within the sound discretion of the trial court to disallow the question. See *State v. Greene*, *supra*, at 492, 206 S.E. 2d at 235. Further, we note that the record does not contain what the witness' answer to the leading question would have been had she been allowed to answer and, therefore, this exception cannot be sus-

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tained. *State v. Fletcher*, 279 N.C. 85, 99, 181 S.E. 2d 405, 414 (1971); 1 Stansbury's N.C. Evidence § 26, at 62 (Brandis rev. 1973). Similar exceptions are brought forward under this assignment pertaining to leading questions put to two other witnesses, defendant's mother and sister, with similar results. None of these exceptions can be sustained and these assignments are overruled.

[5] Defendant next assigns as error the action of the trial court in allowing the jury to take an item—some plastic black tape—into the jury room. The record indicates that the tape was introduced as substantive evidence. G.S. 15A-1233(b)² states the statutory rule under which the jury may request and take into the jury room exhibits which have been received in evidence. The statute allows such action with the consent of the parties. In the case *sub judice*, when the request was made, neither the State nor the defendant entered an objection—nor does the record show that either consented. While we believe that the better practice should be for the trial judge to determine whether or not the parties consent before allowing the jury request, we nevertheless hold that having failed to enter an objection or otherwise indicate his lack of consent, the defendant waived his right to object. This assignment therefore presents no question for our review.

[6] Defendant next assigns as error the denial of the trial court of his motion to suppress defendant's clothing. Defendant's oral motion to suppress came at the conclusion of the testimony of J. H. Ross, one of the State's witnesses. Defendant did not object to the testimony of Officer Ross in describing defendant's clothing or describing the circumstances under which he obtained defendant's clothing. Neither did defendant interpose any objection when the clothing, which had been properly identified as an exhibit, was offered into evidence. Under these circumstances, the admission of this evidence will not be reviewed on appeal. *See State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). This assignment is overruled.

² G.S. 15A-1233(b) reads as follows:

(b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

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[7] Defendant next assigns as error the denial by the trial court of his motion to examine the jurors as to whether they had read a Raleigh newspaper story pertaining to defendant's trial. Defendant's counsel described the story to the trial court, indicating that the story related that defendant, a parolee, was on trial in Wake Superior Court on charges of breaking into a restaurant and pawn shop and shooting a Raleigh policeman with the officer's gun. The following exchange then took place:

COURT: Sir, have you any evidence that any juror has read that article or any other articles since they have been impounded as jurors in this case?

MR. DEAN: No, sir, I have not, of course, communicated with any juror. I am sometimes afraid to smile at them in the hall. I have not been in the jury room. Don't know if the newspaper is in there. I would have to answer the court's question in the negative. I don't believe any defense attorney, unless he has approached a juror, could determine if he had been reading a newspaper, and I would not approach one.

COURT: Then there is no legal basis for the court to make such an inquiry and absent even a *prima facie* showing of legal necessity for the court to make inquiry, the court will not. Your motion is respectfully denied.

In *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 183 S.E. 2d 652 (1971), our Supreme Court, faced with a similar question, said:

"As a general rule, the allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court." [Citation omitted.] There is no evidence in this record that any of the jurors had read or heard about the article in question or that defendants were in any manner prejudiced by it. Better practice would have been for the court to inquire of the jurors to see if any of them had read or heard about the article in question, and if so, had been in any manner influenced by it. However, in the absence of any showing of prejudice, no abuse of discretion is shown. Error will not be presumed. [Citations omitted.]

279 N.C. at 432-33, 183 S.E. 2d at 655. No prejudice having been shown here, we find no abuse of discretion, and this assignment is

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overruled.

[8] Defendant also assigns as error the failure of the trial court to grant his motion for dismissal. While the evidence against defendant on the breaking and entering and larceny charges was substantially circumstantial, the evidence was clearly sufficient to take these charges to the jury. Within minutes after a police officer responded to an activated burglar alarm at Reliable Loan Company, defendant was seen in the parking lot at a point near the rear entrance of the Charcoal Flame Restaurant and Reliable Loan Company. The time was approximately three o'clock in the morning of Sunday, 17 February. When seen by the police officer, defendant immediately began to run from the scene. Police officers discovered that both businesses had been forcibly entered and goods removed from the loan company. After apprehension, officers found a work glove in defendant's clothing similar to another work glove found at the scene of the break-ins. Defendant's clothing contained dust particles similar to those found inside the premises of the break-in, where a brick wall between the two establishments had been broken open to allow passage from the restaurant to the loan company. During defendant's flight from the scene, he violently resisted apprehension and arrest. At the hospital, defendant made incriminating statements recognizing that he was in the parking lot behind the buildings. This evidence, when viewed in the light most favorable to the State, and considered, as required, so as to give the State the benefit of every reasonable inference to be drawn from it, *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977), was sufficient to overcome defendant's motions on the breaking and entering and larceny charges. The evidence on the assault charges is so clear and so strong as not to require discussion. This assignment is overruled.

We have examined defendant's remaining assignments of error, find them to be without merit, and overrule them. Defendant was given a fair trial, free from prejudicial error.

The results are:

In 80CRS8961A, judgment is arrested.

In 80CRS8961B, 80CRS8960, and 80CRS8962,

No error.

Judges ARNOLD and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 FEBRUARY 1981

STATE v. DORSEY No. 804SC855	Onslow (79CRS17258)	No Error
STATE v. JOHNSON No. 8014SC676	Durham (79CRS30310) (79CRS30312) (79CRS30314)	No Error
STATE v. LOWERY No. 8012SC858	Cumberland (80CRS0722)	No Error
STATE v. PETERS No. 8018SC731	Guilford (79CRS14507)	No Error
STATE v. RAMSEY No. 8028SC811	Buncombe (79CRS21798) (79CRS21799)	No Error
STATE v. SMITH No. 8030SC750	Haywood (80CRS1021) (80CRS921)	No Error
STATE v. TILLEY No. 8021SC847	Forsyth (77CRS43956) (77CRS43957)	Affirmed
STATE v. WICKER No. 8012SC874	Cumberland (80CRS9355)	No Error
UTTER v. UTTER No. 8010DC543	Wake (78CVD450)	Affirmed
WILLIAMS v. GOFF No. 808SC636	Wayne (78CVS236)	No Error

APPENDIX

PRESENTATION OF MALLARD PORTRAIT



**CEREMONIES
FOR THE PRESENTATION OF A PORTRAIT
OF
THE LATE CHIEF JUDGE RAYMOND BOWDEN MALLARD
TO
THE NORTH CAROLINA COURT OF APPEALS
2 OCTOBER 1981
COURTROOM OF THE COURT OF APPEALS
COURT OF APPEALS BUILDING
RALEIGH**

INTRODUCTORY REMARKS
BY
CHIEF JUDGE NAOMI E. MORRIS

Ladies and Gentlemen:

The Court is convened this morning for the purpose of receiving the portrait of the Honorable Raymond B. Mallard who served as Chief Judge of this Court from its inception in July 1967 to his retirement as of August 1st, 1973 because of illness.

For the Court and for the Mallard family I express to you our gratitude for your presence at the presentation of the first portrait to this Court.

The Mallard family has requested that the presentation be made by Honorable Hugh B. Campbell, who was also a member of the original Court and served until his retirement as of January 1st, 1975. Judge Campbell and Judge Mallard served on the Superior Court bench together, and the friendship formed then strengthened during their service on this Court. It is most fitting that the presentation be made by Judge Campbell, and the Court now recognizes him.

PRESENTATION ADDRESS
BY
THE HONORABLE HUGH B. CAMPBELL

If it please the Court I have the distinct honor and the greatest personal pleasure to present to this Court the portrait of Raymond Bowden Mallard.

I have not seen the portrait but feel satisfaction from having highly endorsed the artist to the Mallard family. I have been assured that the portrait is excellent and that the artist, Joe King of Winston-Salem, put the twinkle in Mallard's eyes. In my opinion this was of great importance and reflects much of Mallard's personality.

Raymond Bowden Mallard was born on the 20th of February, 1908 in Duplin County, North Carolina on the John Wesley Mallard homeplace, located about two miles Southwest of Faison Depot (near the present Faison Auction Market). He was the son of Judson Ricaud Mallard and Eva May Bowden Mallard. He was one of three children, all boys. When he was four years old his mother died and subsequent to his father's remarriage Mallard went to live with his maternal grandparents, Mr. and Mrs. Samuel Allen Bowden, on their farm near Calypso, Duplin County, North Carolina.

Mallard was not born to wealth, nor to high position. He knew work as a boy on a farm and since every man to a significant degree is a product of his upbringing, his grandparents are due much credit for molding the character of the man Mallard became.

He attended the public shools of Duplin County at Calypso and graduated from high school when he was 15 years of age, in 1923. There was no money for a college education but Mallard was not to be denied further education which he so earnestly desired. He worked his way and made the most of the limited opportunities. He attended Wake Forest College and the Wake Forest College Law School in Wake Forest, North Carolina.

In January, 1931 he passed the North Carolina Bar examination given by the North Carolina Supreme Court and on January 26, 1931 and until October, 1932, Raymond practiced law in Whiteville, the county seat of Columbus County, North Carolina. During this time he shared an office with John Charles Memory.

In October, 1932 Raymond made a significant move and established his permanent residence in Tabor, which in 1935 became Tabor City, Columbus County, North Carolina.

On June 8, 1935 Raymond Mallard and Lula McGougan of Tabor City were married. This was a wonderful and happy marriage as each had much to contribute and they pulled well in double harness. They had one child, Anne Elizabeth, who married E. C. Sanders, Jr. (known as Sonny) and there were two grandchildren, LuAnne Sanders and Mary Elizabeth (Libby) Sanders, born July 23, 1962 and March 5, 1965 respectively.

On different occasions in the 1930's and 1940's Raymond served as solicitor of the Columbus County Recorder's Court, as County Attorney and as Tax Attorney. He was the first President of the Tabor City Rotary Club 1937-1938. He was a thirty-second degree Mason and past Master of Tabor Lodge Number 563.

Raymond Mallard was elected to the North Carolina General Assembly in 1939 and represented Columbus County in that august body.

His busy law practice was interrupted by World War II and he served in the armed forces of his country from early 1944 until after the surrender of Japan in late 1945. He was a Sergeant in the infantry when the war was over and he could return to his beloved Tabor City and resume his law practice. He served as attorney for the towns of Tabor City, Chadbourne, Lake Waccamaw and Bolton.

The 1955 General Assembly expanded the Superior Court system and increased the number of Superior Court Judges. Governor Luther Hodges appointed Raymond Mallard to one of the new positions. On July 1, 1955 Raymond met in Raleigh with the other new appointees and all the old Superior Court Judges and the Justices of the Supreme Court for a swearing in ceremony. It was the largest gathering ever of members of the North Carolina Judiciary. Never in the history of the state had so many Judges and Justices been sworn in at one time. Governor Hodges and many other dignitaries were present. On this occasion I first met Raymond Mallard and this was the beginning of a most warm and treasured friendship.

Raymond became a Superior Court Judge from the Thirteenth Judicial District and I from the Twenty-Sixth Judicial District.

We were both elected to our respective positions in a state wide election the following year and continued to serve as Judges of the Superior Court for 12 years. We saw each other only once or twice a year as he rotated in the Second Division in the east and I rotated in the Fourth Division in the far west. Conferences of all the Judges were held once a year lasting a couple of days but our friendship grew warmer and I developed a high regard for his ability and genuine interest in fostering the administration of justice.

Judge Mallard was not widely known outside of Columbus County when he first began his judicial career but he rapidly grew in recognition and his reputation expanded. Raleigh, the State Capital and County Seat of Wake County, had, as always, a strong bar and the lawyers tended to be a bit smug with their superior legal knowledge and ability. To say the least they were not overcome with enthusiasm for the new small town country lawyer who came to preside over their Superior Court. In fact, they were merely tolerant and resigned to putting up with him for six months every four years. This attitude was not to last long. The grey haired man with a large brief case had the ability and could hold his own in any company of lawyers. Not only was he smart but he was a tireless worker. His keen, twinkling eyes never missed a trick and his lack of a large physical body was more than made up for by his positive and determined demeanor and that index finger carried more weight and authority than any club in the hand of a giant.

In the words of one Raleigh lawyer, and I quote, "I well remember the speculation among the Raleigh lawyers about him. The consensus seemed to be that he was just one more country lawyer turned Judge that we'd have to put up with for six months out of each four years. We'd just schedule important cases around him and not be too bothered. If he turned out to be a pretty good fellow we might even teach him a little something. Then we began to hear disturbing rumors. This fellow was showing some class and you couldn't run over him. In fact, it was said, but not really believed, that he might run over you. Then he came to town — a little grey man with an enormous bulging briefcase which he guarded as if it held the crown jewels. By the end of the first Monday the word was out — there was blood all over the courthouse and the walls were festooned with the hides of the lawyers who had crossed him. We all found we had urgent business out of town — some even left the state. It didn't take long for another word to get out — about a week — the word was, 'if you have something to try, and if you know how to try it, this is the man!' There was some

skepticism but it soon disappeared and all of us decided to try our real cases for we had a real Judge — our teacher — our friend. There never was a man more patient in teaching a young lawyer how to try a case, nor was there anyone quicker to grasp the real problem in a case. There never was one more intolerant of incompetence or poor preparation. He thought a lawyer owed a duty to his client to be prepared and he held him to that duty.”

For 12 years Mallard held court in the Second Division which contained 20 counties and extended from Virginia to the north to South Carolina on the south. The following counties were the terminal points: Brunswick County on the southeast, Scotland County on the southwest, Person County on the northwest and Warren County on the northeast. The 20 counties comprised eight judicial districts from the 9th through the 16th and under his rotation schedule he held court for six months in each district and it required four years to make a complete round. His reputation as a tough, fair, sincere and learned Judge with compassion grew. From time to time he was sent out of his division to try difficult cases. He tried many important and controversial cases such as the Labor Union case of Boyd Payton and the Brewer case. As a trial Judge he had no superiors and few equals. He controlled a courtroom by force of personality and universal respect. He was hard and tough but with it all he was understanding and fair and his sincerity stood out like a beacon.

I once heard an associate of his on the bench make the remark that with all of Mallard's reputation for toughness, if he had to be tried for anything, he would rather have Mallard as the Judge than anyone else for he knew he would obtain an absolutely fair trial.

Mallard understood and administered justice under the law. Justice under the law is the rule of law and results in order. This is what all Judges should strive to attain.

In 1967 the General Assembly created a new judicial system and divided the appellate division into the Supreme Court and a new court, the Court of Appeals. Governor Dan K. Moore was authorized to appoint the first members of that court to consist of six members and the Chief Justice of the Supreme Court was authorized to appoint the Chief Judge. Raymond Mallard was one of the six appointed by Governor Moore and Chief Justice R. Hunt Parker appointed him Chief Judge.

Again our lives touched because I was also one of the first six

appointees. We took office as of the 1st day of July, 1967. Mallard was sworn in on the 7th day of July, 1967 in Raleigh by Chief Justice R. Hunt Parker. We met for our first full conference in Raleigh during the month of August, 1967 since David M. Britt had a private practice to close and did not take the oath of office until August 9, 1967. He was the last of the six appointees to be sworn in.

Mallard had already been at work making preparations to get a new court organized and functioning. We had no courtroom, no offices, no rules, no secretaries, nothing. We were real pilgrims with no guide posts. Mallard opened that first conference and asked for Divine Guidance to help us.

Our first offices were in the then new NCNB Building. We had a floor with no partitioning walls. A representative of the General Services Office met with us and had the floor plan. We designated offices for each Judge, a conference room and a library. We did this so quickly that the General Services representative couldn't believe we were serious. He returned the next day for instructions and Mallard assured him we had given all necessary instructions the day before and we wanted them carried out as soon as possible so that we could get to work.

We did get the offices, furniture and supplies and we were in business, but had no business. It was not until January, 1968 that we heard our first court case. We had been busy, however. We had adopted rules of court and had them approved by the Supreme Court. We had escaped having our court convene in an abandoned garage and instead through the good graces of Tom White of Kinston were permitted to have a courtroom established in the new Legislative Building. During all this turmoil and frustrating experiences, Mallard was everywhere guiding, persuading and supervising.

In December, 1967 we had our first tragedy when Judge James C. Farthing died from a sudden heart attack. He was succeeded by Francis Marion Parker of Asheville, who was appointed by Governor Dan K. Moore on December 23, 1967 and sworn in on January 23, 1968 by Chief Justice R. Hunt Parker in our new temporary courtroom in the Legislative Building.

Judge Mallard was forced into a political campaign in the spring of 1968 and like everything he entered into he gave it his all. He was successful and on November 5, 1968 was elected in a state-wide election to the judgeship to which he had been appointed.

On November 20, 1969 Chief Justice William H. Bobbitt, who had succeeded R. Hunt Parker, appointed Mallard as Chief Judge of the Court of Appeals and he continued in this position until illness compelled his retirement as of August 1, 1973.

On August 1, 1973 Judge Mallard took the oath of office as an emergency Judge of the Court of Appeals and thus became the first emergency Judge of that court.

Raymond Mallard was a deeply religious person. He belonged to Tabor City Baptist Church where he served as a Sunday School teacher, Sunday School Superintendent and member of the Board of Deacons.

Raymond was rightly proud of receiving the John J. Parker Award in 1969 from the North Carolina Bar Association and I quote: "In recognition of conspicuous service to the cause of jurisprudence in North Carolina."

From time to time Raymond received numerous awards, honors and recognitions from his fellow Judges, Wake Forest University, Columbus County Board of Commissioners and various others.

In 1977 the Columbus County Bar honored him by having his portrait painted and then, with the permission of the county commissioners, hung in the Superior Courtroom on February 7, 1977. It was officially Judge Raymond B. Mallard Day in Columbus County and a great old time was had.

With it all Raymond never lost the common touch and it was refreshing to walk the streets of Tabor City with him and see with what obvious affection and respect he was held by one and all of his fellow townsmen.

Raymond B. Mallard died on July 20, 1979 and is buried in Tabor City. He was a great man who left his mark on this court. It is entirely fitting that his portrait hang in this courtroom.

In closing I would like to read the prayer by T. L. Cashwell, Jr., Minister, Hayes Barton Baptist Church given at the opening session of the North Carolina Court of Appeals January 30, 1968. I like to think it set the theme of this court as Raymond Mallard desired.

"Eternal Father of us all, save this moment from being merely a gesture. Grant to these thy servants a sacred moment of quiet before they take up the duties of a new

and awesome task.

Deliver them from the foolishness of impatience. Let not anxiety keep any from doing his best work. May they be swayed not by emotion or ambition, but by calm conviction.

Endow them with 'wisdom for their decisions, understanding in their thinking, love in their attitudes, and mercy in their judgments.'

Bless their loved ones and their families, and make their homes sanctuaries of love and peace where they may find spiritual resources for the strain and the pressures of their duties here.

Now that our prayer is said, let them not think that their dependence upon thee is over. Bless them always with thy Spirit, to guide and direct them, that at the close of this and every day, they may merit thy 'Well done', and the respect of all our people, through Jesus Christ our Lord. Amen."

REMARKS OF CHIEF JUDGE NAOMI E. MORRIS IN
ACCEPTING THE PORTRAIT OF THE LATE
CHIEF JUDGE RAYMOND BOWDEN MALLARD

The Portrait will be unveiled by Judge Mallard's grand-daughters, LuAnne and Libbey Sanders, in both of whom the Chief took great pride.

Thank you LuAnne and Libbey. Thank you, Judge Campbell for your very fitting tribute to Judge Mallard. Chief Justice Parker's appointment of Judge Mallard to be the Chief Judge of the newly created Court of Appeals received enthusiastic response from the lawyers and laymen. I had the distinct pleasure and privilege of working with him from the beginning of the Court to the time he found it necessary to retire. His service as Chief Judge fulfilled the high promise which attended his appointment.

He was a strong Judge, both on the trial bench and the appellate bench — totally free of the debilitating desire for popular approval. His abhorrence of mediocrity was readily apparent to those who appeared before him not adequately prepared. His attack was always frontal and his handling of all issues before him was forthright, full, and fair. If he had a doubt, it was not hidden. I don't believe he ever wrote a word he did not believe or cast a vote he did not think was right. It would be difficult to find a man and his work more happily matched.

We are indeed appreciative to Mrs. Mallard and Anne Elizabeth for this portrait of our friend and associate, and we accept it with gratitude for his service and with respect and love for the Chief. A record of these proceedings will be included in the minutes of the Court and printed in the North Carolina Court of Appeals Reports.

The artist, Mr. Joe King of Winston-Salem, had planned to be with us today, but, because of an important business conference, he had to leave for Europe last Sunday.

In order that the members of the Court and all of you present may have the opportunity of greeting the members of Judge Mallard's family, they will form a receiving line as directed by the Marshal. When the line has been formed, the Court will rise and the judges will leave the bench for the purpose of greeting those in the receiving line. After the Court has had the opportunity of greeting the family, the audience is invited to proceed down the receiving

line as directed by the Marshal. Because of the lack of room, it would be appreciated if you would remain seated until the Marshal gives you other instructions.

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ADOPTION

§ 2. Parties and Procedure

Trial court erred in placing the child in question with petitioners for adoption since the statutory provision for adoption is by a special proceeding before the clerk of superior court, and there was no evidence to support trial court's finding that the department of social services which had custody of the child "wrongfully and unreasonably withheld its consent for adoption." *In re Sloop*, 201.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

In a personal injury action where defendant sought contribution from third party defendants as joint tort feors, trial court's order entering summary judgment for third party defendants adjudicated fewer than all claims and plaintiffs appeal therefrom was interlocutory. *Green v. Power Co.*, 646.

§ 6.6 Appeals Based on Motions to Dismiss

An order denying defendant's motion to dismiss plaintiff's claim for punitive damages was not immediately appealable. *Williams v. East Coast Sales*, 565.

§ 6.9. Appealability of Preliminary Matters

An interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights is immediately appealable. *In re Ferguson*, 681.

§ 16.1. Limitations on Powers of Trial Court after Appeal

Where defendant appealed an order with respect to child visitation privileges, the trial court had no jurisdiction pending the appeal to entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt for failure to comply with the order and seeking to have the order modified. *Webb v. Webb*, 677.

§ 17. Supersedeas and Stay Bonds

While the trial court had authority to require defendant to post a bond in order to stay execution pending appeal of a judgment requiring defendant to pay alimony and counsel fees, the court did not have authority to dismiss defendant's appeal for failure to post the required bond but had authority only to dissolve any stay already issued. *Faught v. Faught*, 635.

§ Request for Finding of Fact

Defendant's proposed finding of fact is not before the appellate court for consideration where defendant failed to request the trial court to make such a finding and then to except to its failure to do so. *Groves & Sons V. State*, 1.

ARBITRATION AND AWARD

§ 7. Conclusiveness of Award

In an action to recover damages for the alleged wrongful suspension or discharge of plaintiff from his employment with defendant, trial court properly entered summary judgment for defendant where plaintiff had previously initiated a grievance under a collective bargaining agreement which had culminated in arbitration and the decision of the arbitrator denied plaintiff's grievance. *Tucker v. Telephone Co.*, 112.

ARCHITECTS

§ 3. Defective Conditions

In an action to recover damages resulting from defendant's failure properly to install a roof, plaintiff's claims were not barred by the issuance of the architect's final certification of completion and the resulting final payment by plaintiff to defendant contractor of the contract price. *Bd. of Education v. Construction Corp.*, 238.

ARREST AND BAIL

§ 3.4. Warrantless Arrest for Narcotics Violation

An officer had reasonable suspicion of defendants' criminal activity so that his warrantless detention of them was proper. *State v. Tillet*, 520.

§ 9.2 Bail After Trial

Trial court had authority to require a defendant to post a secured appearance bond for his post-conviction release while his appeal was pending and to consign defendant to the custody of the Wake County Probation Office and to order that defendant report to the Probation Office by noon each Monday. *State v. Cooley*, 544.

ASSAULT AND BATTERY

§ 5.3. Relation of Assault with Deadly Weapon to Other Crimes

Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape did not subject him to double jeopardy. *S. v. Herring*, 298.

§ 13. Competency of Evidence

In a prosecution of defendant for carrying a concealed weapon, trespass, and assaulting law enforcement officers with a firearm while in the performance of their duties, trial court did not err in admitting evidence concerning defendant's prior criminal record. *State v. Withers*, 547.

§ 14.3. Sufficiency of Evidence of Assault with Intent to Kill Inflicting Serious Injury

Trial court properly denied defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury made on the ground that there was insufficient evidence of an intent to kill. *S. v. Herring*, 298.

§ 15.5. Instruction on Defense of Self

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, a jury question was raised as to whether defendant reasonably felt he was in imminent danger of a homosexual assault and whether he used more force than was necessary to repel the assault. *State v. Molko*, 551.

ATTORNEYS AT LAW

§ 3.1. Extent of Attorney's Authority

In an action to enforce an oral contract for child support which had been negotiated by the attorneys for the mother and father, trial court properly granted judgment n.o.v. for the executor of the estate of the father, since there was no

ATTORNEYS AT LAW—Continued

evidence that the father gave his attorney express authority to bind him to additional terms proposed by the mother's attorney. *Stevens v. Johnson*, 536.

The trial court erroneously determined that an attorney's consent to the entry of a judgment against plaintiffs based on a referee's report was within the scope of his authority as attorney of record for plaintiffs. *Caudle v. Ray*, 641.

§ 7.4. Fee Based on Provisions of Notes

In an action to recover on a note which provided that, if any amount payable was collected through an attorney, the maker agreed to pay the holder a reasonable amount as costs, attorney and collection fees, plaintiff was estopped to claim 15% of the outstanding balance owing on the note as provided by G.S. 6-2.1. *American Foods v. Farms, Inc.*, 591.

§ 7.5. Allowance of Fees as Part of Costs

Plaintiff corporation is not entitled to attorney fees pursuant to 42 U.S.C. §§ 1983 and 1988 in an action in which it was held that G.S. 95-136(a) is unconstitutional to the extent that it purports to authorize warrantless OSHA inspections of business premises and that an administrative inspection warrant for plaintiff's premises was not based on probable cause and was invalid. *Lumber Co. v. Brooks, Comr. of Labor*, 194.

§ Grounds for Disciplining Attorney

Defendant attorney engaged in professional conduct prejudicial to the administration of justice and adversely reflecting upon his fitness to practice law where he told a potential adverse witness that his client would not testify against the witness if the witness would not testify against his client and advised the witness not to appear in court or to plead the Fifth Amendment. *State Bar v. Graves*, 450.

An order of public censure was not unreasonably harsh punishment for defendant attorney's unprofessional conduct in encouraging a potential adverse witness not to testify against his client in return for an agreement by the client not to give any testimony which might incriminate the potential witness. *Ibid.*

AUTOMOBILES**§ 62.3. Negligence in Striking Pedestrians Walking Along Highway**

Trial court erred in entering summary judgment for defendant driver where there was an issue of fact as to whether he was negligent in driving his automobile into plaintiff jogger on the highway while the visibility was clear. *Parker v. Windborne*, 410.

§ 79. Contributory Negligence in Intersection Accident

In an action to recover for injuries sustained by plaintiff in an intersection accident, trial court did not err in refusing to set aside the verdict finding plaintiff contributorily negligent. *Fisher v. Thompson*, 724.

§ 83.2. Contributory Negligence of Pedestrian Walking along Highway

In an action to recover for personal injuries sustained by plaintiff jogger when he was struck by defendant's automobile, issues of fact existed as to whether plaintiff's negligence in violating G.S. 20-174(d) by not jogging on the left-hand side of the road was a proximate cause of his injury and as to whether plaintiff failed to keep a

AUTOMOBILES—Continued

proper lookout in that he saw the vehicle and then started to cross the road in front of it. *Parker v. Windborne*, 410.

§ 89.3. Last Clear Chance With Respect to Passengers in Dangerous Positions on Vehicles

In an action to recover for personal injuries sustained by plaintiff when she fell from the back of a pickup truck owned and operated by defendant, trial court did not err in refusing to submit to the jury the issue of last clear chance. *Stephens v. Mann*, 133.

§ 131.1. Sufficiency of Evidence of Hit and Run Driving

Evidence was sufficient for the jury in a prosecution of defendant for being an accessory after the fact to hit and run driving. *State v. Fearing*, 475.

§ 131.2. Instructions in Hit and Run Driving Case

In a prosecution for being an accessory after the fact to hit and run driving, trial court's instruction was erroneous because it gave the impression that, if the accident did involve injury or death to a person, knowledge that an accident had occurred was sufficient to provide the element of willful failure to stop, and did not require a showing of the driver's knowledge of injury or death to a person. *State v. Fearing*, 475.

In a prosecution of defendant for being an accessory after the fact to hit and run driving, the trial court's instructions as to guilty knowledge and as to what the jury must find in order to convict defendant were proper. *S. v. Duvall*, 684.

BILLS AND NOTES

§ 4. Consideration

Where plaintiffs sought to nullify a promissory note executed by them to defendants but defendants counterclaimed to recover on the note, plaintiffs failed to establish the defense of want of consideration, and the trial court did not err in excluding evidence tending to show that the loan made by defendants went not to plaintiffs personally but to a partnership in which plaintiffs were involved. *Wolfe v. Eaker*, 144.

There was sufficient consideration for defendant wife's execution of a note and deed of trust to plaintiff where defendants executed the note and deed of trust pursuant to the settlement of an action by plaintiff against defendant husband to recover an amount due under an agreement dissolving a business partnership, and where property of the partnership in which defendant wife had no interest was transferred by the partnership into the name of defendant husband and defendant wife. *Deal v. Christenbury*, 600.

§ 19. Defenses

Where plaintiffs sought to nullify a promissory note executed by them to defendants but defendants counterclaimed to recover on the note, plaintiffs failed to establish the defense of non-delivery. *Wolfe v. Eaker*, 144.

§ 20. Judgments in Actions on Notes

Where the jury returned a verdict for defendants in the face amount of a note, trial court did not err in entering judgment n.o.v. for defendants in an amount equal to the face amount of the note plus interest. *Wolfe v. Eaker*, 144.

BROKERS AND FACTORS

§ 6. Real Estate Broker's Right to Commissions

Trial court properly entered summary judgment for defendant in an action by a licensed real estate broker to recover a commission for having procured a prospective purchaser for property owned by defendant. *Renfro v. Meacham*, 491.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.1. Sufficiency of Evidence of Identification of Defendant as Perpetrator

In a prosecution of defendant for breaking or entering, evidence relating to the actions of a bloodhound should have been excluded, and evidence was insufficient to show that defendant was the perpetrator.

§ Sufficiency of Evidence of Breaking and Entering and Larceny of Business Premises

The State's evidence was sufficient for the jury in a prosecution for breaking and entering a restaurant and a loan company and larceny of property from the loan company. *S. v. Byrd*, 736.

§ 7.1. Verdict

A defendant who is tried for acting in concert with others to commit felonious larceny after a felonious breaking or entering may be convicted of felonious larceny if the jury does not reach a verdict as to the felonious breaking or entering. *S. v. Percy*, 210.

CARRIERS

§ 10. Injury to Goods in Transit

In an action to recover damages to plaintiff's storage bins while being transported by defendant carrier, trial court properly entered summary judgment for defendant on the issue of special or consequential damages and properly instructed on the measure of damages. *Zarn, Inc. v. Railway Co.*, 372.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Defendant husband had no standing to attack the constitutionality of the statute requiring a privy examination of the wife for a separation agreement. *Harris v. Harris*, 305.

§ 24.6. Service of Process and Jurisdiction

In an action to recover against defendants as guarantors of plaintiff's employment contract, G.S. 7-75.4(5) authorized in personam jurisdiction over defendant who was an N.C. resident at the time the contract was entered into. *Johnston v. Gilley*, 274.

In an action to recover damages for breach of an employment contract, defendant foreign corporation had sufficient minimum contacts with N.C. to subject it to the in personam jurisdiction of our courts under our statutes and the Due Process Clause of the Fourteenth Amendment. *Mabry v. Fuller-Shuwayer Co.*, 245.

CONSTITUTIONAL LAW—Continued**§ 26.6. Full Faith and Credit for Alimony Judgment**

A Florida court had no in personam jurisdiction over defendant in an action to recover alimony due plaintiff, and a default judgment for alimony entered by the Florida court was not entitled to full faith and credit. *Russ v. Russ*, 553.

§ 30. Access of Accused to Evidence

Trial court did not err in denying defendant's motion for a free transcript of a previous and separate trial in which two men arrested with him and tried on the same charges were acquitted by a jury. *S. v. McCullough*, 184.

§ 34. Double Jeopardy

Defendant was not placed in double jeopardy by his trial on charges of assault upon a law officer with a firearm while he was in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, but where defendant was convicted upon both charges, judgment must be arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties. *S. v. Byrd*, 736.

§ 35. Waiver of Constitutional Rights.

Evidence was sufficient to support trial court's findings that defendant knowingly, intelligently, freely, and voluntarily waived each of her constitutional rights. *State v. Roberts*, 557.

§ 51. Speedy Trial; Delay Between Crime and Notice of Charge

Defendant who contended that he was denied his constitutional right to a speedy trial failed to show that he was prejudiced as a result of a 367 day delay from the time of the occurrence of the alleged drug sale until his first appraisal of the charges against him. *State v. Salem*, 419.

§ 67. Identity of Informants

Trial court did not err in refusing to allow defendant to ask questions concerning the identity of a confidential informant whose tip led to defendant's arrest. *S. v. Ellis*, 181.

CONTRACTS**§ 21.2. Breach of Construction Contracts**

Where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications. *Bd. of Education v. Construction Corp.*, 238.

In an action to recover damages allegedly resulting from defendant's failure properly to install a roof, the trial court erred in determining that the jury's answer to the issue as to whether defects in the roof resulted from deficiencies in the design and specifications provided by plaintiff's architect barred plaintiff from recovering any damages from defendant's subcontractor under its maintenance agreement. *Ibid.*

In an action to recover damages resulting from defendant's failure properly to install a roof, plaintiff's claims were not barred by the issuance of the architect's final certification of completion and the resulting final payment by plaintiff to defendant contractor of the contract price. *Ibid.*

CONTRACTS—Continued

§ 27.2. Sufficiency of Evidence of Breach of Contract

In an action for breach of a contract for grading to be performed on a new segment of a highway, trial court correctly ruled and instructed the jury that the contract in question was not ambiguous, and evidence was sufficient to support the jury's finding that there was no breach of the grading contract. *Brown v. Scism*, 619.

§ 29.5. Interest on Recovery

In an action to recover for breach of a grading contract where the jury found that there was no breach and the amount of money retained by plaintiff was due defendant under the contract, trial court properly allowed defendant interest from the date he was entitled to the money held by plaintiff. *Brown v. Scism*, 619.

CORPORATIONS

§ 25. Contracts and Notes

Under Georgia law defendant could be held personally liable on a note which he executed as president of a corporation which had not yet been formed but which was subsequently incorporated and which made payments on the note until default. *Smith v. Morgan*, 208.

COSTS

§ 4.1. Witness Fees

Trial court had no authority to tax expert witness fees against appellant as a portion of the costs where the record contains no subpoenas for these witnesses. *Groves & Sons v. State*, 1.

COURTS

§ 3. Original Jurisdiction of Superior Court

Solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature, and solicitation to commit a crime against nature was therefore not an infamous misdemeanor under G.S. 14-3 so that the superior court did not have original jurisdiction of such a charge. *S. v. Tyner*, 206.

§ 9.1. Review of Rulings of Another Superior Court Judge on Motion for Special Venire

Trial judge did not err in granting the State's motion for a special venire after another judge had denied such a motion six months earlier. *S. v. Duvall*, 684.

CRIMINAL LAW

§ 4. Distinction Between Crimes, Misdemeanors

Solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature, and solicitation to commit a crime against nature was therefore not an infamous misdemeanor under G.S. 14-3 so that the superior court did not have original jurisdiction of such a charge. *S. v. Tyner*, 206.

Superior court did not err in dismissing an indictment against defendant for lack of subject matter jurisdiction where the indictment alleged that defendant solicited three others to possess and deliver more than one ounce of marijuana, which

CRIMINAL LAW—Continued

was not in itself an infamous offense, and the indictment did not charge elements of secrecy, deceit and intent to defraud. *S. v. Jarvis*, 679.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Defendant was not subjected to double jeopardy where he was convicted of possession and sale of methamphetamine. *State v. Salem*, 419.

Defendant was not placed in double jeopardy by his trial on charges of assault upon a law officer with a firearm while he was in the performance of his duties and assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, but where defendant was convicted upon both charges, judgment must be arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties. *S. v. Byrd*, 736.

§ 33. Facts in Issue and Relevant to Issues

Evidence of the acquittal of third persons arrested with defendant for the crimes charged was not relevant evidence at defendant's trial. *S. v. McCullough*, 184.

§ 34.7. Evidence of Other Offense Admissible to Show Motive

In a prosecution of defendant for carrying a concealed weapon, trespass, and assaulting law enforcement officers with a firearm while in the performance of their duties, evidence concerning defendant's prior criminal record was admissible to show motive. *State v. Withers*, 547.

§ 40. Evidence at Former Trial; Unavailability of Witness

The trial court properly found that a witness was unavailable so as to permit the introduction of a transcript of testimony given by the witness at a prior trial of defendant where the witness had not been in the county of his residence for more than a year and the SBI had been unable to locate him; furthermore, trial court properly found that the testimony of a second witness was unavailable so as to permit the introduction of a transcript of his testimony at the prior trial of defendant where the witness was present in the courtroom but asserted his right against self-incrimination and refused to testify in violation of a plea bargain agreement. *S. v. Keller*, 364.

§ Photographs

In a prosecution of defendant for being an accessory after the fact to hit and run driving, trial court did not err in admitting into evidence a photograph of the accident victim. *S. v. Duval*, 684.

§ 44. Bloodhounds

In a prosecution of defendant for breaking or entering, evidence relating to the actions of a bloodhound should have been excluded. *S. v. Lanier*, 383.

§ 45.1. Experimental Evidence

The trial court in a murder case did not err in admitting evidence of an experiment as to lighting conditions at the murder scene. *S. v. Spicer*, 214.

§ 48. Implied Admission by Silence

In a prosecution of defendant, a deputy sheriff, for being an accessory after the fact to a felony, defendant's silence at the scene of the alleged crime was relevant. *S. v. Duwall*, 684.

CRIMINAL LAW—Continued**§ 58. Evidence as to Handwriting**

The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant. *State v. Thompson*, 484.

§ 62. Lie Detector Tests

Trial court properly excluded evidence of defendant's willingness to take a polygraph test. *S. v. Duvall*, 684.

§ 65. Evidence as to Emotional State

In a prosecution of defendant for being an accessory after the fact to hit and run driving, trial court did not err in excluding testimony of defendant's expert psychiatric witness giving his definition of panic and his opinion as to whether defendant suffered panic upon discovery of the accident victim's body. *S. v. Duvall*, 684.

§ 66.9. Suggestiveness of Photographic Procedure

In a prosecution of defendant for uttering a forged check, trial court properly admitted a bank teller's identification of defendant from a photographic display. *S. v. McCullough*, 184.

§ 73. Hearsay Testimony

The trial court properly sustained an objection to the question "What did you say to him and what did he say to you?" since the question was designed to elicit hearsay testimony. *S. v. Byrd*, 736.

§ 74.3. Competency of Confession Implicating Codefendant

Statements made by defendant at the arrest scene which implicated the codefendant constituted spontaneous utterances and were admissible against the codefendant even though defendant did not testify at the trial and the codefendant thus had no opportunity to cross-examine him. *S. v. Porter*, 568.

§ 75. Admissibility of Confessions in General

Defendant's confession was relevant for the purpose of showing that he was the perpetrator of the embezzlement charged. *S. v. Bryant*, 139.

§ 75.7. When Warning of Constitutional Rights is Required; What Constitutes Custodial Interrogation

Statements made by defendant at the arrest scene in response to a police radio message not directed to him were not the result of in-custody interrogation and were admissible against him although he had not been given the Miranda warnings. *S. v. Porter*, 568.

§ 75.13. Confessions to Persons Other Than Police Officers

When taking a defendant who was a bail jumper into custody, a bail bondsman was not acting as a law officer or as an agent of the State, and the bondsman had no obligation to give defendant the Miranda warnings in order to render admissible incriminating statements made by defendant to the bondsman. *State v. Perry*, 540.

§ 76.5. Necessity for Findings of Fact on Admissibility of Confession

Since defendant's affidavit failed to support his motion to suppress, trial court properly denied the motion summarily without making findings of fact. *S. v. Smith*, 188.

CRIMINAL LAW—Continued**§ 89.1. Evidence of Character Bearing on Credibility**

The trial court properly refused to allow defense counsel to cross-examine a witness about the general reputation of the State's chief witness for truth and veracity. *S. v. Spicer*, 214.

§ 89.8. Credibility of Witnesses; Promise of Leniency or Other Reward

The district attorney violated G.S. 15A-1054(c) by failing to give defendants written notice prior to trial of an offer to permit a State's witness to plead guilty to misdemeanors in 11 felony cases pending against him in return for his truthful testimony against defendants, but noncompliance with the statute did not require suppression of the witness's testimony. *S. v. Spicer*, 214.

§ 90.2. When Cross-Examination of Own Witness May Be Permitted

Trial court did not err in refusing to declare a confidential informant as a hostile witness. *State v. Salem*, 419.

§ 92.3. Consolidation of Charges Against Same Defendant

Defendant waived any right of joinder of offenses involving possession and sale of contraband where he failed to move for joinder. *S. v. Jones*, 263.

The trial court did not err in consolidating for trial charges against defendant for assaults on a law officer and charges against defendant for breaking and entering and larceny. *S. v. Byrd*, 736.

§ 98.1. Misconduct of Witnesses

In a prosecution for rape and incest, trial judge did not abuse his discretion in denying defendant's motion for a mistrial because of outbursts by the prosecuting witness. *S. v. Allen*, 173.

§ 101.1. Statements or Misconduct by Prospective Jurors

Trial court did not err in failing to declare a mistrial during jury selection process because of a statement made during a recess by a rejected juror in the presence of jurors who had been accepted. *S. v. Pollock*, 169.

§ 101.2. Exposure to Publicity or Evidence Not Formally Introduced

Defendant was not entitled to a mistrial in a prosecution for possession and sale of heroin where three jurors read a newspaper article which included information of defendant's prior conviction on a charge of selling heroin. *S. v. Jones*, 263.

The trial court did not abuse its discretion in denying defendant's motion to examine the jurors as to whether they had read a newspaper article pertaining to defendant's trial and stating that defendant was a prison parolee. *S. v. Byrd*, 736.

§ 101.4. Misconduct During Jury Deliberations

Defendant waived objection to the action of the court in permitting the jury to take into the jury room an item which had been introduced into evidence by failing to object at trial. *S. v. Byrd*, 736.

§ 106.4. Sufficiency of Evidence; Confession

In a prosecution for embezzlement, evidence that defendant's employer sustained a loss of merchandise and that items bearing the employer's identification were recovered during a police investigation corroborated, however circumstantially, defendant's confession to the crime. *S. v. Bryant*, 139.

CRIMINAL LAW—Continued**§ 106.5. Sufficiency of Accomplice Testimony**

There is no merit in defendant's contention that the uncorroborated testimony of an accomplice should not be sufficient to support a conviction when it is contrary to that offered by other more reliable witnesses and when the accomplice has committed perjury in a previous trial concerning the same transaction. *S. v. Keller*, 364.

§ 111.1. Particular Miscellaneous Jury Instructions

Reading a portion of the bill of indictment solely as part of the jury charge is not a violation of G. S. 15A-1213. *S. v. Allen*, 173.

§ 112.3. Charges Referring to Evidence or to Weight or Lack Thereof

In a prosecution of defendants for two armed robberies, the trial court did not err in instructing the jury that it could consider only the evidence it heard from the witness stand and the exhibits after the jury asked the court whether it had to base its verdict strictly on the evidence it had heard since one of the robbery victims was not available to testify at the trial. *State v. Jones*, 560.

§ 113.7. Charge on Acting in Concert

The trial court in an armed robbery case properly instructed the jury on acting in concert. *S. v. Commedo*, 666.

§ 117. Charge on Character Evidence

Failure of the court to give an instruction as to how the jury should view character evidence is not error absent a request for such an instruction. *State v. Thompson*, 484.

§ 117.2. Charge on Credibility of Interested Witnesses

Trial court in an incest case was not required to instruct the jury to view the testimony of the victim with caution. *S. v. Pollock*, 169.

§ 117.3. Charge on Credibility of State's Witnesses in General

The trial court did not err in failing to instruct the jury that two witnesses who testified pursuant to an agreement that they would not be prosecuted for certain charges against them were interested in the verdict. *S. v. Keller*, 364.

The trial judge in a murder case sufficiently informed the jury of a possible plea bargain agreement between the district attorney and a State's witness. *S. v. Spicer*, 214.

§ 117.4. Charge on Credibility of Accomplices and Codefendants

Trial court did not err in failing to instruct the jury that an accomplice is guilty, as an accomplice, of the crime charged against defendant. *S. v. Keller*, 364.

§ 118. Charge on Contentions of the Parties

Trial court's instructions to the jury were prejudicial where the court did not summarize the evidence but consistently and without exception stated the contentions of the parties, and in stating the State's contentions, included matters that were not in evidence. *S. v. Wagner*, 286.

§ 118.1. Disparity in Time or Stress Given to Contentions

The trial court in an embezzlement case did not improperly fail to give equal stress to the contentions of the State and of the defendant by taking more time in stating the State's contentions than in stating those of defendant. *S. v. Thompson*, 484.

CRIMINAL LAW—Continued**§ 124.1. Validity of Verdict**

There was no merit to defendant's contention that the verdict against him was invalid because the jury foreman did not sign it. *S. v. Collins*, 155.

§ 142. Probation and Suspended Sentences

There was no merit to defendant's contention that he should have been placed on probation and that the trial judge failed to exercise his discretion and dismissed the motion for probation summarily. *S. v. Duvall*, 684.

§ 143.1. Notice of Probation Revocation Hearing

Defendant was given sufficient written notice of his probation revocation hearing where he was served with an arrest order and signed a waiver of counsel form which acknowledged that he had been informed of the charges against him. *S. v. Gamble*, 658.

§ 143.2. Probation Revocation Hearing and Procedure

The trial court at a probation revocation hearing was not required to inform defendant of his right to remain silent at the hearing. *S. v. Gamble*, 658.

§ 143.4. Right to Counsel at Probation Revocation Hearing

The trial court did not err in failing to ascertain at the time of a probation revocation hearing whether defendant knowingly and intelligently waived his right to counsel where defendant had executed a written waiver of counsel prior to the hearing. *S. v. Gamble*, 658.

§ 143.5. Competency of Evidence at Probation Revocation Hearing

Defendant was not denied his right of cross-examination at a probation revocation hearing because the State read the probation violation report into the record. *S. v. Gamble*, 658.

§ 153. Jurisdiction of Lower Court Pending Appeal

Defendant's motion for appropriate relief should have been filed initially in the Court of Appeals rather than in the trial court where it was filed after defendant had given notice of appeal. *State v. Thompson*, 484.

DAMAGES**§ 3.4. Compensatory Damages for Mental Anguish**

Damages for mental anguish were properly awarded to plaintiffs in an action for breach of a contract to convey burial rights in a specified crypt. *Hill v. Memorial Park*, 231.

§ 17.7. Punitive Damages

Punitive damages were properly awarded to plaintiff in an action for breach of contract to convey burial rights in a specified crypt. *Hill v. Memorial Park*, 231.

In an action to recover compensatory and punitive damages allegedly resulting from the destruction by fire of a building owned by plaintiff and insured by defendant where defendant denied plaintiff's claim on its belief that plaintiff was involved in the fire, trial court properly entered summary judgment for defendant on the issue of punitive damages. *Shields v. Insurance Co.*, 355.

DIVORCE AND ALIMONY

§ 11. Indignities to the Person Which Render Life Burdensome

In plaintiff's action for divorce from bed and board, the wife's testimony about the husband's activities with another woman was admissible for the purpose of proving alleged indignities suffered by plaintiff at defendant's hands. *Vandiver v. Vandiver*, 319.

Evidence was sufficient to enable the jury to find for plaintiff in her action for divorce from bed and board on the grounds defendant had inflicted such indignities upon her as to render her life burdensome. *Ibid*.

§ 16.5. Competency of Evidence in Alimony Action

Trial court did not err in refusing to allow defendant, at the hearing on the amount of alimony, to put on evidence of plaintiff's acts of misconduct in order to reduce or deny the alimony. *Vandiver v. Vandiver*, 319.

§ 16.6. Sufficiency of Evidence in Alimony Action

Evidence was sufficient to support trial court's conclusion that plaintiff was the dependent spouse and defendant the supporting spouse. *Vandiver v. Vandiver*, 319.

§ 16.8. Ability to Pay Alimony; Dependent and Supporting Spouse

Defendant was not entitled to a jury trial on the issue of supporting and dependent spouse status. *Vandiver v. Vandiver*, 319.

§ 18.16. Attorney's Fees

There was no merit to defendant's contention that, because plaintiff's claim for alimony pendente lite was denied, plaintiff was precluded from recovering attorney's fees in the subsequent action for permanent alimony. *Vandiver v. Vandiver*, 319.

§ 21. Enforcement of Alimony Awards

The fact that plaintiff allowed an adult boyfriend to live with her in her house with a minor child did not constitute a breach of her separation agreement with defendant which would prohibit the court from ordering specific performance of the agreement, and the court properly entered an order of specific performance of the alimony provisions of the agreement. *Harris v. Harris*, 305.

§ 25. Child Custody in General

Where a husband and wife are living together and the children are in their joint custody and are being adequately supported by the supporting spouse, in the absence of allegations which would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support. *Harper v. Harper*, 394.

EASEMENTS

§ 6.1. Evidence in Actions to Establish Prescriptive Easement

Trial court properly entered summary judgment for defendants on plaintiffs' claim of a prescriptive easement where plaintiffs rested on stipulations and offered no evidence that their use of the way across defendants' property was other than by permission. *Clifton v. Fesperman*, 178.

EASEMENTS—Continued**§ 7.1. Actions to Establish Easements**

In plaintiff's action to enjoin the expansion of a theatre in the shopping center where plaintiff leased a store, there was no merit to plaintiff's argument that the lease in conjunction with parol statements of the original parties thereto gave it an easement in the common areas of the shopping center and that as a result it had a veto power over future expansion. *Drug Stores v. Mayfair*, 442.

EMBEZZLEMENT**§ 4. Indictment**

Indictments for embezzlement were not invalid because they failed to allege the specific dates on which the offenses occurred but instead alleged that they occurred on or about 1 January of each year for which an indictment was returned. *State v. Thompson*, 484.

§ 6. Sufficiency of Evidence

Evidence of defendant's confession and of the employer's loss of merchandise and the discovery of items bearing the employer's identification was sufficient for the jury. *S. v. Bryant*, 139.

Evidence that defendant city clerk wrote salary checks to herself in excess of the amount authorized was sufficient to support her conviction of embezzlement. *State v. Thompson*, 484.

EMINENT DOMAIN**§ 3.2. Public Purpose; Taking for Highways and Streets**

In plaintiffs' action to enjoin the taking of their property for the building of an access road, the disputed road did not serve to facilitate access by the public or by individual users to the dominant highway, did not meet the statutory definition of a frontage road, was not necessary to provide access because all other access had been denied, and was intended to serve a private and not a public purpose. *Realty Corp. v. Bd. of Transportation*, 106.

§ 5.4. Instructions on Amount of Compensation

Trial court in an eminent domain proceeding properly instructed that the jury should not consider any evidence of value based upon petitioner power company's intended use of the property although some of respondents' witnesses had testified that the highest and best use of the property was the same as that planned by petitioner. *Power & Light Co. v. Merritt*, 269.

Court's instruction in an eminent domain case that "the just compensation merely requires that the [landowners] should be paid for what is taken from them" could not have misled the jury. *Ibid.*

§ 6.5. Testimony as to Value

The trial court in an eminent domain proceeding did not err in failing to instruct on the propriety of non-expert testimony as to value. *Power & Light Co. v. Merritt*, 269.

In a condemnation proceeding in which the sole issue at trial was the amount due defendants as compensation for the taking of their property, trial court erred in permitting plaintiff to cross-examine defendants' value witness concerning his purchase of property in the vicinity several years before. *Bd. of Transportation v. Chewning*, 670.

EMINENT DOMAIN—Continued**§ 13. Actions by Owner for Compensation**

Trial court erred in dismissing plaintiff's inverse condemnation suit for failure to state a claim upon which relief could be granted where plaintiff alleged that pursuant to a lease with a landowner, it constructed a large outdoor advertising sign on the property in question, the city condemned the land for a sewage easement, and the city then entered the land and cut down plaintiff's sign. *Advertising Co. v. City of Charlotte*, 150.

ESTOPPEL**§ 4.7. Equitable Estoppel**

Defendant husband was estopped from denying the validity of a separation agreement where defendant performed his obligations under the agreement for some 32 months and accepted the benefits of the agreement. *Harris v. Harris*, 305.

EVIDENCE**§ 11.8. Waiver of Right to Rely on Dead Man's Statute**

In an action to recover on a note, affidavit testimony on which the trial court based its decision need not have been excluded as testimony of transactions with a deceased person since defendant opened the door for admission of the affidavits. *Nye v. Lipton*, 224.

§ 13. Communications Between Attorney and Client

The attorney-client privilege was not violated by the attorney's testimony concerning her observation of defendant's physical condition or concerning matters discussed with defendant while plaintiff was present. *Harris v. Harris*, 305.

§ 29.2. Business Records

Plaintiff highway contractor's daily work reports and a compilation of total extra costs based on those reports were admissible under the business entries exception to the hearsay rule. *Groves & Sons v. State*, 1.

In a personal injury action the accident report prepared by an officer investigating the accident in question in the normal course of his employment qualified for admission under the hearsay exception for entries made in the regular course of business. *Fisher v. Thompson*, 724.

§ 32.2. Application of Parol Evidence Rule

In an action for breach of contract to convey burial rights in a crypt, testimony by the female plaintiff that Crypt "D" was the subject of negotiations between plaintiffs and defendant did not violate the parol evidence rule. *Hill v. Memorial Park*, 231.

In an action to enjoin defendants from constructing an expansion of a theatre in the shopping center where plaintiff's store was located, the trial court did not err in refusing to consider testimony by plaintiff's representative and the original developer of the shopping center concerning the intent of the parties with respect to expansion or alteration of the shopping center and parking spaces. *Drug Stores v. Mayfair*, 442.

EVIDENCE—Continued**§ 34.1. Admissions Against Interest**

In a personal injury action trial court properly allowed defendant to testify concerning plaintiff's statement against her interest. *Fisher v. Thompson*, 724.

§ 48. Competency and Qualification of Experts

In an action to recover the value of general hospital services rendered by plaintiff to one defendant, trial court erred in refusing to allow plaintiff's credit manager to give his opinion as to whether plaintiff's charges for defendant's care and treatment were reasonable. *Hospital v. Brown*, 526.

§ 50.1. Medical Testimony as to Cause of Injury

A medical expert was properly permitted to give opinion testimony as to the cause of plaintiff's pain without the use of a hypothetical question. *Smith v. Carolina Footwear, Inc.*, 460.

FRAUD**§ 12. Sufficiency of Evidence**

Trial court erred in entering summary judgment for defendant landlord on plaintiff's claim of fraud in the renting of shopping center space. *Kent v. Humphries*, 580.

FRAUDS, STATUTE OF**§ 6. Contracts Affecting Realty**

Summary judgment was properly entered for defendant on plaintiff's contract claim because the oral five year lease upon which plaintiff's claim necessarily relied was void as a matter of law under the statute of frauds. *Kent v. Humphries*, 580.

GUARANTY**§ 2. Actions to Enforce Guaranty**

In an action to recover on a note executed by a corporation and payable to plaintiff where plaintiff alleged that defendants unconditionally guaranteed the note, that demand was made on the corporation for payment but no payment was made, and that demand was made on defendants for full payment but no payment was made, trial court properly entered summary judgment for plaintiff. *Bank v. Woronoff*, 160.

GUARDIAN AND WARD**§ 12. Actions on Bonds**

A bond providing coverage of defendant as guardian of an incompetent was one continuing bond regardless of the fact that annual renewal premiums were paid. *Duckett v. Pettee*, 119.

Where the individual defendant was removed as guardian for an incompetent and plaintiff was appointed as guardian and duly qualified, plaintiff's cause of action against the former administrator for funds due the incompetent and against the former administrator's surety accrued to plaintiff upon his qualification as guardian. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 9. Actions Against Board of Transportation

A letter from plaintiff contractor constituted sufficient written notice to defendant Board of Transportation of plaintiff's claim of a "changed condition" at a highway construction site caused by excessive soil wetness and its demand for an equitable adjustment based thereon. *Groves & Sons v. State*, 1.

The evidence supported the trial court's determination that the parties were mutually mistaken at the time of plaintiff contractor's bid on a highway construction project as to the soil conditions which actually existed and that plaintiff encountered "changed conditions" at the work site caused by excessive soil wetness so as to entitle plaintiff to an equitable adjustment in compensation for additional work. *Ibid*.

Defendant Board of Transportation waived any expectation of adherence by plaintiff contractor to the schedule for completion of a highway construction contract and cannot assess liquidated damages against plaintiff for failure to complete work by the date set in the contract. *Ibid*.

HOMICIDE

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The State's evidence was sufficient to support convictions of defendants for second degree murder by shooting the victim from a passing truck. *S. v. Spicer*, 214.

Evidence that defendant was "messing around with a shotgun" and the gun accidentally went off, killing his sister, was insufficient to be submitted to the jury on the charge of second degree murder. *S. v. Wagner*, 286.

§ 21.9. Sufficiency of Evidence of Manslaughter

Evidence that defendant was "messing around with a shotgun" and the gun accidentally went off, killing his sister, was insufficient to be submitted to the jury on the charge of voluntary manslaughter but was sufficient on the charge of involuntary manslaughter. *S. v. Wagner*, 286.

§ 28.5. Instructions on Defense of Others

The evidence in a homicide case was sufficient to require an instruction on the right of defendant as a private citizen to interfere with and prevent the victim from committing a felonious assault on another. *S. v. Patterson*, 280.

The trial court in a homicide prosecution erred in failing to include not guilty by reason of defense of another in the final mandate to the jury. *Ibid*.

§ 30.2. Instructions on Manslaughter

The evidence in a murder prosecution was insufficient to support a jury finding that defendants acted in the heat of passion caused by adequate provocation so as to require the court to instruct the jury on the lesser included offense of voluntary manslaughter. *S. v. Spicer*, 214.

HUSBAND AND WIFE

§ 1. Husband's Support Obligation

A husband is liable for the cost of his wife's necessary medical care. *Hospital v. Brown*, 526.

HUSBAND AND WIFE—Continued**§ 6. Right to Testify Against Spouse**

In plaintiff's action for divorce from bed and board, the wife's testimony about the husband's activities with another woman was admissible for the purpose of proving alleged indignities suffered by plaintiff at defendant's hands. *Vandiver v. Vandiver*, 319.

§ 10. Requisites and Validity of Separation Agreements; Compliance With Statutory Formalities

Defendant husband had no standing to attack the constitutionality of the statute requiring a privy examination of the wife for a separation agreement. *Harris v. Harris*, 305.

Plaintiff wife furnished adequate legal consideration for defendant's promise in a separation agreement to pay alimony in a sum equivalent to 50% of his retirement pay each month. *Ibid.*

§ 10.1. Requisites and Validity of Separation Agreements; Void and Voidable Agreements

A separation agreement was not manifestly unreasonable or unfair to defendant husband because it required him to pay to plaintiff wife one-half of his military retirement pay for life. *Harris v. Harris*, 305.

Defendant husband was estopped from denying the validity of a separation agreement where defendant performed his obligations under the agreement for some 32 months and accepted the benefits of the agreement. *Ibid.*

§ 11.1. Effect of Separation Agreement

In an action by plaintiff against her former husband to recover funds from the sale of entirety property, summary judgment was properly entered for defendant since the parties' separation agreement expressly governed matters complained of by plaintiff in her complaint. *Cone v. Cone*, 343.

§ 13. Enforcement of Separation Agreement

The fact that plaintiff allowed an adult boyfriend to live with her in her house with a minor child did not constitute a breach of her separation agreement with defendant which would prohibit the court from ordering specific performance of the agreement, and the court properly entered an order of specific performance of the alimony provisions of the agreement. *Harris v. Harris*, 305.

§ 15. Nature and Incidents of Estate by the Entirety

When real property held by husband and wife as tenants by the entirety is foreclosed and sold pursuant to a power of sale in a deed of trust, the funds so generated retain the characteristics of the underlying property and thus are constructively held by the entirety. *In re Foreclosure of Deed of Trust*, 69.

A claim of the I.R.S. against a husband was a lien against property owned solely by the husband, and the I.R.S. had no lien against land which was the subject of a foreclosure since it was entirety property. *Ibid.*

INCEST**§ 1. Generally**

Trial court in an incest case was not required to instruct the jury to view the testimony of the victim with caution. *S. v. Pollock*, 169.

INCEST—Continued

Defendant could properly be charged with incest and second degree rape though the two offenses arose out of the same transaction and were based on the same facts. *S. v. Allen*, 173.

INFANTS

§ 17. Confessions and other forms of self-incrimination in juvenile hearings

In a juvenile delinquency proceeding where it was alleged that respondent committed a felony, there was no merit to respondent's contention that he was not advised of his right to have a parent present before making an inculpatory statement during an in-custody interrogation, that he did not waive his rights, and that the court should have made findings of fact and conclusions of law in support of its order denying its motion to suppress the statement. *In re Horne*, 97.

Statements given by the minor defendant to investigating officers prior to his arrest were admissible where there was no showing that he was not advised of his constitutional rights. *S. v. Wagner*, 286.

§ 18. Admissibility and sufficiency of evidence in juvenile hearings

In a juvenile delinquency proceeding where it was alleged that respondent feloniously broke into and entered a grocery store and stole merchandise, there was no merit to respondent's contention that merchandise found in his possession was not sufficiently identified as that stolen from the store in question. *In re Horne*, 97.

§ 20. Judgments and orders; dispositional alternatives in juvenile courts

The juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to adjudications that he was delinquent. *In re Hughes*, 258.

The district court sufficiently found that respondent juvenile's behavior constituted a threat to persons or property in the community to support commitment of respondent to the Division of Youth Services. *Ibid*.

INSURANCE

§ 1. Control and regulation generally

Defendant insurance agency "procured" errors and omissions insurance written by an insurer not licensed to do business in N.C. for various insurance agents in this State and was therefore liable for the premium tax imposed by G.S. 58-53.3. *Ingram, Comr. of Insurance v. Insurance Agency*, 510.

§ 27.1. Credit life insurance

All policies of "credit, accident and health insurance" issued in N.C. cover "death or personal injury by accident" as well as "sickness, ailment or bodily injury." *Newbold v. Insurance Co.*, 628.

INTEREST

§ 1. Items drawing interest in general

The trial court could properly award prejudgment interest on protested unemployment compensation tax payments recovered in an action against the Employment Security Commission. *Begley v. Employment Security Comm.*, 432.

INTOXICATING LIQUOR

§ 12. Competency and relevancy of evidence generally

Testimony concerning beer and wine found at defendant's home was competent in a prosecution for illegal possession of intoxicating liquor for the purpose of sale. *State v. Harrell*, 531.

§ 15. Sufficiency of evidence on charge of illegal possession for purpose of sale

The State's evidence was sufficient for the jury in a prosecution for illegal possession of intoxicating liquor for the purpose of sale. *State v. Harrell*, 531.

JUDGES

§ 5. Disqualification of judges

In a prosecution of defendant for being an accessory after the fact to a felony, there was no merit to defendant's contention that he was deprived of a fair trial because the judge was biased against him. *S. v. Duvall*, 684.

JURY

§ 1. Nature and extent of right to jury trial

Respondent mother had no constitutional right to a jury trial in a proceeding to terminate her parental rights. *In re Ferguson*, 681.

§ 2.1. Grounds for motion for special venire; discretion of trial court

Trial judge did not err in granting the State's motion for a special venire after another judge had denied such a motion six months earlier. *S. v. Duvall*, 684.

§ 3.1. Competency and qualification of jurors generally

Though the trial court deviated from the statutorily prescribed method of jury selection, defendant failed to show that he was prejudiced. *S. v. Harper*, 198.

LANDLORD AND TENANT

§ 6. Construction and operation of leases generally

In an action to enjoin defendants from constructing an expansion of a theatre in the shopping center where plaintiff's store was located, the trial court did not err in refusing to consider testimony by plaintiff's representative and the original developer of the shopping center concerning the intent of the parties with respect to expansion or alteration of the shopping center and parking spaces. *Drug Stores v. Mayfair*, 442.

§ 14. Holding over; tenancies from year to year and month to month

Where plaintiffs' lease expired and could not be extended beyond 30 April 1973 but plaintiffs continued to hold over, plaintiffs were at best tenants from year to year under the applicable terms of the expired lease, and an option to purchase provided in the lease could not be construed as applicable to the tenancy from year to year. *Vernon v. Kennedy*, 302.

In an action for summary ejectment, a question of fact was presented for the jury as to whether defendant was holding over after the expiration of the lease term. *Trust Co. v. Rubish*, 662.

§ 15. Tenancies at will and at sufferance

Where plaintiff entered premises under a void lease and was therefore a tenant at will, she nevertheless had a fixed property right in the premises during the period for which she had already paid rent. *Kent v. Humphries*, 580.

LARCENY

§ 7.2. Identity of property stolen

In a juvenile delinquency proceeding where it was alleged that respondent feloniously broke into and entered a grocery store and stole merchandise, there was no merit to respondent's contention that merchandise found in his possession was not sufficiently identified as that stolen from the store in question. *In re Horne*, 97.

§ 7.8. Sufficiency of evidence of felonious breaking and entering and larceny

The State's evidence was sufficient for the jury in a prosecution for larceny of property from a loan company pursuant to a breaking and entering. *S. v. Byrd*, 736.

MASTER AND SERVANT

§ 10.2. Actions for wrongful discharge of employment

In an action to recover damages for the alleged wrongful suspension or discharge of plaintiff from his employment with defendant, trial court properly entered summary judgment for defendant. *Tucker v. Telephone Co.*, 112.

§ 19. Liability of contractor or main contractor to employees of independent contractor

In an action to recover for injuries sustained by plaintiff, an employee of an independent contractor, while he was working on a portable elevator on defendant's premises, evidence was sufficient to be submitted to the jury on the issue of negligence, and evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law. *Cook v. Tobacco Co.*, 89.

§ 55.1. Necessity for, and what constitutes, "accident" as compensable injury

Evidence was sufficient to support a finding by the Industrial Commission that plaintiff was not involved in anything other than her usual work routine where she was simply engaged in a greater volume of lifting than was her ordinarily assigned task. *Dyer v. Livestock, Inc.*, 291.

§ 69.1. Meaning of "disability"

While in the ordinary case, "disability" can be measured in terms of percentage, where claimant has a pre-existing disability to the same part of the body which is affected by a subsequent compensable injury, disability must be measured in terms of capacity to earn wages. *Ridenhour v. Transport Corp.*, 126.

§ 74. Disfigurement as an item of recovery

There was no evidence in the record to support a finding by the Industrial Commission that an injury to plaintiff's finger resulted in "serious bodily disfigurement." *Weidle v. Cloverdale Ford*, 555.

§ 77.1. Grounds for modification of award; changed condition

Plaintiff was not entitled to an award of compensation based on changed condition where the Industrial Commission made findings of fact supported by competent evidence that plaintiff did not in fact suffer any loss of capacity to work from her work related injury but that her disability resulted from an unrelated automobile accident. *Smith v. Carolina Footwear, Inc.*, 460.

§ 93.3. Admissibility of expert evidence

A medical expert was properly permitted to give opinion testimony as to the

MASTER AND SERVANT—Continued

cause of plaintiff's pain without the use of a hypothetical question. *Smith v. Carolina Footwear, Inc.*, 460.

§ 101. "Employees" within coverage of Law

Employees of schools operated by the Roman Catholic Church are exempt from the unemployment tax statutes. *Begley v. Employment Security Comm.*, 432.

§ 106. Collection and amount of unemployment compensation tax

The U.S. Secretary of Labor was not a necessary party to an action to determine whether the unemployment tax statutes applied to employees of schools operated by the Roman Catholic Church in N.C. *Begley v. Employment Security Comm.*, 432.

The trial court could properly award prejudgment interest on protested unemployment compensation tax payments recovered in an action against the Employment Security Commission. *Ibid.*

MORTGAGES AND DEEDS OF TRUST**§ 4.1. Consideration for note and deed of trust**

There was sufficient consideration for defendant wife's execution of a note and deed of trust to plaintiff where defendants executed the note and deed of trust pursuant to the settlement of an action by plaintiff against defendant husband to recover an amount due under an agreement dissolving a business partnership, and where property of the partnership in which defendant wife had no interest was transferred by the partnership into the name of defendant husband and defendant wife. *Deal v. Christenbury*, 600.

§ 17.1. Particular acts constituting payment and satisfaction

Where the holders of a \$37,000 note secured by a deed of trust executed a subordination agreement upon payment by defendants of \$30,000 on the note, the parties agreed that upon payment of \$7,000 on a certain date the deed of trust would be cancelled of record, and neither party directed application of the \$30,000, the trial court properly held that the \$30,000 payment was not a mere prepayment of installments of the indebtedness but was given as consideration for the subordination agreement, and that the \$30,000 payment did not alter the provision of the note requiring an installment payment to be made on a certain date. *Grimes v. Sea & Sky Corp.*, 654.

§ 25. Foreclosure by exercise of power of sale in the instrument

A foreclosure and sale pursuant to a power of sale in a deed of trust is not voluntary. *In re Foreclosure of Deed of Trust*, 69.

While the superior court may require a bond upon appeal from that court in a foreclosure proceeding, the courts do not have the power to make the posting of the bond a condition to the appeal, and it was error for the court to dismiss respondents' appeal from that court when the bond required by the court was not posted. *In re Foreclosure of Deed of Trust*, 413.

Testimony that advancements were made on an original note secured by a deed of trust and that "shuck notes" not secured by a deed of trust were used as evidence of the advancements on the original note was sufficient to support a finding by the court that advancements were made on the original note which was secured by the deed of trust. *Ibid.*

MORTGAGES AND DEEDS OF TRUST—Continued**§ 32.1. Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust**

G.S. 45-21.38 did not prohibit plaintiff from recovering a deficiency judgment after foreclosure of a deed of trust where the note and deed of trust contained on their face no showing that they were for the balance of purchase money for real estate. *Deal v. Christenbury*, 600.

In an action to recover on a note, trial judge did not err in denying defendants' motion for summary judgment and in striking defendants' defense that they were entitled to the protection afforded by G.S. 45-21.38 which prohibits deficiency judgments on purchase money transactions. *American Foods v. Farms, Inc.*, 591.

§ 33.1. Disposition of surplus proceeds upon foreclosure and sale

When real property held by husband and wife as tenants by the entirety is foreclosed and sold pursuant to a power of sale in a deed of trust, the funds so generated retain the characteristics of the underlying property and thus are constructively held by the entirety. *In re Foreclosure of Deed of Trust*, 69.

A claim of the I.R.S. against a husband was a lien against property owned solely by the husband, and the I.R.S. had no lien against the land which was the subject of the foreclosure since it was entirety property. *Ibid.*

MUNICIPAL CORPORATIONS**§ 21. Injuries in connection with sewers and sewage disposal**

In an action to recover damages sustained by plaintiffs when sewage backed up into their home from the sewer system owned and operated by defendant, plaintiffs were not entitled to proceed to trial under the doctrine of *res ipsa loquitur*. *Arey v. Bd. of Light & Water Comm.*, 505.

NARCOTICS**§ 3.1. Competency of evidence**

In a prosecution of defendant for possession and sale of marijuana and cocaine, there was no merit to defendant's contention that there was not a sufficient showing of a chain of custody of drugs identified at trial. *S. v. Cuthrell*, 195.

In a prosecution of defendant for possession and sale of heroin, trial court did not err in admitting evidence that an officer went to defendant's apartment four days before the date of the crimes charged and paid defendant for a tinfoil package of white powder. *S. v. Jones*, 263.

§ 4. Sufficiency of evidence

In a prosecution of defendant for possession and sale of methamphetamine, there was no merit to defendant's contention that the trial court erred in denying his motion to dismiss made on the ground that the controlled substance was not properly introduced into evidence. *S. v. Salem*, 419.

§ 4.5. Instructions

Where the bills of indictment charged defendant with sale and delivery of cocaine and marijuana, defendant was not prejudiced by the trial court's instruction with respect to sale or delivery. *S. v. Cuthrell*, 195.

NARCOTICS—Continued**§ 35. Verdict and punishment**

Defendant was not subjected to double jeopardy where he was convicted of possession and sale of methamphetamine. *State v. Salem*, 419.

NEGLIGENCE**§ 35.4. Accidents involving motor vehicles**

In an action for the wrongful death of plaintiff's minor son who was injured during tobacco harvesting, trial court properly directed verdict for defendants on the ground that plaintiff's son was contributorily negligent as a matter of law. *Golden v. Register*, 650.

§ 50.1. Negligence in condition of land or buildings

The complaint of a plaintiff who was assaulted and robbed in a mall parking lot was sufficient to state a claim for relief against the owners of the mall based on negligence in failing to provide adequate security for the parking lot, but plaintiff's evidence on motion for summary judgment was insufficient to show that defendant owners knew that a dangerous condition existed as a result of criminal activity in the parking lot or that a dangerous condition with regard to assaults had existed long enough for defendant owners to have discovered it. *Foster v. Winston-Salem Joint Venture*, 516.

§ 51.3. Attractive nuisances

Plaintiffs' evidence was insufficient to be submitted to the jury under the attractive nuisance doctrine in an action to recover for injuries suffered by the minor plaintiff when he went into the maintenance area behind a row of washing machines at defendants' laundry and fell into the moving parts of one of the washing machines. *Samuel v. Simmons*, 406.

§ 59.3. Sufficiency of evidence in actions by licensees

The minor plaintiff became a licensee when he went into the maintenance area behind a row of washing machines at a laundromat, and the owners of the laundromat are not liable for injuries suffered by plaintiff when he fell into the moving parts of a washing machine where plaintiff failed to allege or show that defendant injured him willfully or wantonly. *Samuel v. Simmons*, 406.

NOTICE**§ 2. Sufficiency and requisites of notice**

The trial court properly concluded that a newspaper was one of "general circulation to actual paid subscribers" which could properly publish a county's notices of tax lien sales. *Media, Inc. v. McDowell County*, 705.

If formal action by the county commissioners was necessary to authorize the publication of the notice of sale of tax liens in a specific newspaper, the action of the commissioners in ratifying the tax collector's oral contract for the publication of the notice in a certain newspaper satisfied that requirement. *Ibid.*

PARENT AND CHILD**§ 1. Termination of parent and child relationship**

The statute permitting the termination of parental rights for failure of the

PARENT AND CHILD—Continued

parent to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition does not violate the equal protection clause. *In re Biggers*, 332.

Statutes permitting the termination of parental rights if a child is neglected or if the parents fail to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition for termination of parental rights are not unconstitutionally vague. *Ibid*.

Trial court properly terminated respondent mother's parental rights in her two children where the evidence supported findings by the court that the children were neglected children and that respondent failed to pay any portion of their foster care costs for more than six months preceding the filing of the petition. *Ibid*.

Respondent mother had no constitutional right to a jury trial in a proceeding to terminate her parental rights. *In re Ferguson*, 681.

PRINCIPAL AND AGENT

§ 11. Liabilities of agent to third persons

In an action to recover the amount of a note from the estate of the borrower's attorney-in-fact, summary judgment was properly entered for plaintiff where his affidavits showed that the attorney-in-fact received monies for the borrower but failed to pay plaintiff from those monies as he had agreed to do. *Nye v. Lipton*, 224.

In plaintiff's action to recover the amount of a note from the estate of the borrower's attorney-in-fact, trial court did not err in entering summary judgment against the administrator of the estate of the attorney-in-fact after judgment had been entered against the borrower. *Ibid*.

PROCESS

§ 9. Personal service on nonresident individuals in another state

In an action to recover against defendants as guarantors of plaintiff's employment contract, G.S. 7-75.4(5) authorized in personam jurisdiction over defendant who was an N.C. resident at the time the contract was entered into. *Johnson v. Gilley*, 274.

§ 9.1. Minimum contacts test

In an action to recover against defendants as guarantors of plaintiff's employment contract, one defendant had sufficient minimum contacts with N.C. to justify the trial court's exercise of in personam jurisdiction. *Johnson v. Gilley*, 274.

§ 14.3. Sufficiency of evidence; contacts within this state

In an action to recover damages for breach of an employment contract, defendant foreign corporation had sufficient minimum contacts with N.C. to subject it to the in personam jurisdiction of our courts under our statutes and the Due Process Clause of the Fourteenth Amendment. *Mabry v. Fuller-Shuwayer Co.*, 245.

§ 14.4. Sufficiency of evidence; contract to be performed in this state

In plaintiff's action to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in N.C., the trial court did not err in denying defendant's motion to dismiss for lack of in personam jurisdiction. *Time Corp. v. Encounter, Inc.*, 467.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

In an action to recover damages allegedly resulting from defendants' failure to install properly a roof, the trial court erred in determining that the jury's answer to the issue as to whether defects in the roof resulted from deficiencies in the design and specifications provided by plaintiff's architect barred plaintiff from recovering any damages from defendant's subcontractor under its maintenance agreement. *Bd. of Education v. Construction Corp.*, 238.

Where a contractor is required to and does comply with the plans and specifications prepared by the owner or the owner's architect, the contractor will not be liable for the consequences of defects in the plans and specifications. *Ibid.*

PUBLIC OFFICERS

§ 9. Personal liability of public officers to the public

The chief building inspector of the City of Wilmington was a "public officer" of the City, was engaged in the performance of governmental duties involving the exercise of judgment and discretion in determining whether plaintiffs' greenhouses were constructed in compliance with the applicable law, and could not be liable to plaintiffs in an action based on his inspection of the greenhouses absent proof that he acted maliciously or corruptly or that he acted outside the scope of his duties. *Pigott v. City of Wilmington*, 401.

RAPE

§ 1. Nature and elements of the offense

Defendant could properly be charged with incest and second degree rape, though the two offenses arose out of the same transaction and were based on the same facts. *S. v. Allen*, 173.

§ 4.1. Proof of other acts and crimes

In a prosecution of defendant for rape of his 15 year old daughter and for incest, trial court did not err in permitting the prosecuting witness to testify regarding prior sexual advances and physical abuses by defendant. *S. v. Allen*, 173.

§ 17. Assault with intent to commit rape; generally

Conviction and sentence of defendant for assault with deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape did not subject him to double jeopardy. *S. v. Herring*, 298.

§ 18.1. Competency of evidence of assault with intent to commit rape

In a prosecution for assault with intent to commit rape, trial court did not err in excluding evidence which tended to show prior beatings by the victim's husband. *S. v. Herring*, 298.

§ 18.2. Sufficiency of evidence of assault with intent to commit rape

Trial court properly denied defendant's motion to dismiss a charge of assault with intent to commit rape made on the ground that there was insufficient evidence for the jury to find that defendant intended to gratify his passion in all events whatever resistance the victim might make. *S. v. Herring*, 298.

RAPE—Continued**§ 19. Taking indecent liberties with child**

In a prosecution of defendant for taking indecent liberties with a child, trial court did not err in excluding testimony by defendant, his wife, and an employee of the county department of social services which was offered to show bias, interest, corruption, undue prejudice and influence on the part of the mother of the prosecuting witness. *S. v. Locklear*, 165.

REGISTRATION**§ 4. Priorities**

Defendants were purchasers for value of a mausoleum crypt and, by recording their deed for the crypt, they gained priority under G.S. 47-18(a) over plaintiffs' unrecorded contract to convey the crypt. *Hill v. Memorial Park*, 231.

ROBBERY**§ 4.2. Sufficiency of evidence in common law robbery cases**

Evidence that defendant was the perpetrator of the crime charged was sufficient to be submitted to the jury in a common law robbery case. *S. v. Collins*, 155.

§ 4.3. Sufficiency of evidence in armed robbery case

Evidence was sufficient for the jury in a prosecution for armed robbery of a grocery store manager. *State v. Quinerly*, 563.

§ 4.6. Sufficiency of evidence in case involving multiple perpetrators

The State's evidence was sufficient for the jury to find that both defendants, who were found hiding under a bridge by use of a bloodhound, were guilty of armed robbery of a storekeeper. *S. v. Porter*, 568.

§ 4.7. Evidence of armed robbery insufficient

Evidence was insufficient for the jury in a prosecution for armed robbery. *S. v. Davis*, 674.

RULES OF CIVIL PROCEDURE**§ 37. Failure to make discovery; consequences**

Trial court erred in denying plaintiff attorney's fees for the expense of compelling discovery. *Kent v. Humphries*, 580.

§ 41. Dismissal of actions; generally

Trial court erred in granting one defendant's motion for an involuntary dismissal under Rule 41(b) where the judgment contained no findings of fact but only conclusions of law. *Hospital v. Brown*, 526.

SCHOOLS**§ 1. Establishment, maintenance, and supervision, in general**

The parents of a child with special educational needs did not have standing to raise the issue of whether the Wake County Board of Education or the Department of Human Resources is responsible for tuition expenses of their child at a private school for handicapped children to which their child had been assigned by the Wake County School System. *Linder v. Board of Education*, 378.

SEARCHES AND SEIZURES**§ 10. Search and seizure on probable cause**

An officer had an honest and reasonable suspicion that respondent in a juvenile delinquency proceeding had committed the crime of larceny which justified the officer's detention of respondent and search of a box in respondent's possession. *In re Horne*, 97.

§ 11. Search and seizure of vehicles

A warrantless search of defendant's vehicle was not unconstitutional since prior to the search officers corroborated an informant's tip through their own observations, and one of the officers testified that the confidential informant was known to him and had proven reliable on prior occasions. *S. v. Ellis*, 181.

§ 34. Search of vehicle

Defendants' Fourth Admendment rights were not violated by a warrantless search of their vehicle where an officer had probable cause to suspect that defendants might be engaged in criminal activity, and the officer shone his light into their vehicle and inadvertently saw contraband in plain view. *State v. Tillett*, 520.

STATE

§ 4.1. Actions against officers of state

The chief building inspector of the City of Wilmington was a "public officer" of the City, was engaged in the performance of governmental duties involving the exercise of judgment and discretion in determining whether plaintiffs' greenhouses were constructed in compliance with the applicable law, and could not be liable to plaintiffs in an action based on his inspection of the greenhouses absent proof that he acted maliciously or corruptly or that he acted outside the scope of his duties. *Pigott v. City of Wilmington*, 401.

§ 12. State employees

Due process under U.S. and N.C. Constitutions requires that a permanent State employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before the 15 and 30 day time limits for notice of appeal provided by statute commence to run. *Luck v. Employment Security Comm.*, 192.

The Employment Security Commission failed to give respondent proper notice of the reasons for his dismissal as an employee where the notice stated that respondent had violated certain agency procedures but failed to describe any incidents with sufficient particularity so that respondent could know precisely what acts or omissions were the basis of his discharge. *Employment Security Comm. v. Wells*, 389.

STATUTES

§ 8.1. Prospective and retroactive effect of particular statutes

Application of the Sedimentation Pollution Control Act of 1973 to prevent erosion and sedimentation of public waters resulting from "land-disturbing" activities which occurred before the statute became effective does not constitute an unlawful retroactive application of the statute. *Lee v. Penland-Bailey Co.*, 498.

TAXATION

§ 32. Taxes on solvent credits and intangibles

Customer advances on construction contracts are not "accounts payable" which are deductible under the intangible tax statute. *Midrex Corp. v. Lynch, Sec. of Revenue*, 611.

§ 41.2. Foreclosure of tax lien; notice

The trial court properly concluded that a newspaper was one of "general circulation to actual paid subscribers" which could properly publish a county's notice of tax lien sales. *Media, Inc. v. McDowell County*, 705.

If formal action by the county commissioners was necessary to authorize the publication of the notice of sale of tax liens in a specific newspaper, the action of the commissioners in ratifying the tax collector's oral contract for the publication of the notice in a certain newspaper satisfied that requirement. *Ibid.*

TRIAL

§ 42.2. Quotient verdicts

A jury's verdict finding that defendant breached an agreement for payment of alimony but awarding plaintiff only \$1.00 for such breach did not itself show that it was reached as the result of a quotient or compromise. *Harris v. Harris*, 305.

§ 46. Impeaching the verdict

A juror's affidavit was incompetent to impeach the jury's verdict after the jury had been discharged. *Harris v. Harris*, 305.

TRUSTS

§ 1.2. Validity of trusts; precatory words

Where deceased opened a savings account and on the application form wrote, "Payable to Rose Z. Weaver, as survivor only," there was no trust created with right of survivorship. *Kyle v. Groce*, 204.

UNFAIR COMPETITION

§ 1. Unfair trade practices; in general

The rental of commercial property is trade or commerce within the meaning of G.S. 75-1.1 *Kent v. Humphries*, 580.

VENDOR AND PURCHASER

§ 4. Titles and restrictions

In an action to compel the corporate defendant to purchase property from plaintiffs where defendant alleged that a utility easement across the subject property constituted an encumbrance not satisfactory to it and rendered plaintiffs' title unmarketable, the question of whether the easement was visible, open and notorious and therefore whether defendant would be deemed to have entered a contract to convey intending to take subject to the easement was a jury question. *Waters v. Phosphate Corp.*, 252.

VENDOR AND PURCHASER—Continued**§ 5. Specific performance**

In an action to compel the corporate defendant to purchase property from plaintiffs, there was no merit to defendant's contention that plaintiffs' title was unmarketable on the date of the closing due to the presence of a reverter clause in the deed from plaintiffs' predecessor. *Waters v. Phosphate Corp.*, 252.

WATERS AND WATERCOURSES**§ 2. Percolating waters and subterranean streams**

Application of the Sedimentation Pollution Control Act of 1973 to prevent erosion and sedimentation of public waters resulting from "land-disturbing" activities which occurred before the statute became effective does not constitute an unlawful retroactive application of the statute. *Lee v. Penland-Bailey Co.*, 498.

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